IN THE COURT OF APPEALS OF TENNESSEE
FOR THE MIDDLE SECTION, AT NASHVILLE

SENTINEL TRUST COMPANY, Danny N. Bates, Clifton T. Bates, Howard H. Cochran, and Gary L. O'Brien, *Petitioners-Appellants*	)	No. M2005-01073-COA-R3-CV
v.	)	Davidson Equity No.04-1934-I
KEVIN P. LAVENDER, Commissioner Tennessee Department of Financial Institutions *Respondent-Appellee*	)	

APPEAL FROM FINAL JUDGMENT OF
THE DAVIDSON COUNTY CHANCERY COURT
AT NASHVILLE, TENNESSEE

Brief for Appellants

Semtinel Trust Company, Danny N. Bates, Clifton T. Bates,
Howard H. Cochran, and Gary L. O'Brien

Carrol D. Kilgore (2544)
227 Second Avenue, North, Fourth Floor
Nashville, Tennessee 37201–1631
615-254-8801
Attorney for Appellants

Oral Argument Requested

Table of Comtents

supersedeas to prevent the Commissioner from transferring Sentinel's valuable trust accounts and subsequently refusing to reverse the Commissioner's seizure and liquidation decisions based upon the Court's acceptance of the Commissioner's contention that he was justified in such seizure actions despite the trust company's showings and insistence that: *(i)* a bank has **always** been different from a trust company, because the identifying quality of every bank is that it is authorized to accept deposits (all deposited money thereby becoming unencumbered property of the bank) which create the debtor-creditor relation, with each creditor-depositor absolutely entitled to withdraw its entire deposit any day, while a trust company holds other persons' moneys in trust, with no rights to disbursement except as provided by the trust instrument; *(ii)* the text of the statute does not by its terms authorize the Commissioner to seize trust companies as distinguished from banks, so that the only possible way the text can be modified to make the word "bank" include "trust company" is through application of the law of statutory construction, which the Court arguably refused to enunciate or apply; *(iii)* statutory law expressly withholds authorizing the Commissioner to seize even a "state bank" without a prior due-process hearing except where necessary *to protect depositors' interests* from imminent loss, which power to seize plainly is not be vested as to any company which *has no depositors and never had depositors* (including Sentinel), but which only holds large amounts of other entities' moneys in trust for trust settlors and beneficiaries.

(b) In refusing to grant petitioner Sentinel Trust Company the relief it sought by its sworn petition for *Certiorari* and *Supersedeas* and by its actions in: *(i)* denying, by interlocutory order, the writ of *Supersedeas* to prevent threatened transfer of Sentinel's valuable fiduciary accounts upon a clear showing that the Tennessee Banking Act's language only authorized seizure of "state banks", without either adhering to the law of statutory construction, enunciating any statutory construction theory as arguably expanding the meaning of the word "bank" to include "trust company" despite language incompatibilities, or attempting to demonstrate that the law of statutory construction is irrelevant to the task of construing the statute any way a Tennessee executive department wishes it construed; *(ii)* Looking back to the Court's own denial of *Supersedeas* to attempt to justify denial of *Certiorari* relief as prayed (A) in apparent disregard of the U. S. Supreme Court's due process jurisprudence as to the objective minimum required standard of impartiality and (B) upon speculation that its grant might be ineffective as in a past reported decision, despite the fact that there was no evidence before the Court in the *certiorari* trial that Sentinel's accounts actually had been transferred, and despite the fact that Sentinel still owned its real properties that the Commissioner was trying to sell; *(iii)* in light of the fact that the Respondent Commissioner elected to file an answer as permitted but not required by statute, in which the Commissioner did not deny the well-pleaded allegations of Sentinel's sworn Petition for *Certiorari*, including attached authenticated documentation, the Court failed to explicitly hold and give effect to all well-pleaded allegations of the petition as being established by non-denial; *(iv)* in giving no effect to affirmative proof that the Commissioner erred in assuming, without basis in reason or fact, that Sentinel's *fiduciary* ***assets*** constituted *corporate* ***liabilities,*** and disregarding the unquestionable fact that the large "accounts receivable" did not represent

Table of Cases and Other Authorities

IN THE COURT OF APPEALS OF TENNESSEE
FOR THE MIDDLE SECTION, AT NASHVILLE

SENTINEL TRUST COMPANY, Danny N. Bates, Clifton T. Bates, Howard H. Cochran, and Gary L. O'Brien,	)	
Petitioners-Appellants	)	No. M2005-01073-COA-R3-CV
v.	)	
KEVIN P. LAVENDER, Commissioner Tennessee Department of Financial Institutions	)	Davidson Equity No.04-1934-I
Respondent-Appellee	)	

Appellants' Brief

I.

ISSUES PRESENTED FOR REVIEW

1. Whether the Commissioner acted within his legal authority within the factual background of Appellant corporation (hereinafter, Sentinel) acting as indenture trustee under hundreds of bond indentures, and required to liquidate the assets of over 60 suddenly-defaulted (1998-1999) bond issues, of which Sentinel had closed out all but 13 when the respondent Commissioner of Financial Institutions claimed and exercised the authority to seize said company in 2004 upon his theory that statutory empowerment by the Tennessee Banking Act, T.C.A. Title 45, Chapters 1 and 2 (herein, the Act), to seize an insolvent **bank** empowered him likewise to seize a **trust company** without prior hearing, as to which the Act provided a procedure different from seizure (and inapplicable to banks) for cases of trust-company insolvencies when construed in compliance with the applicable

law, being Tennessee's law of statutory construction, does the said Act, as amended by Ch. 620, Public Acts of 1980 (empowering the said Commissioner of Financial Institutions to thereafter charter trust companies, but excluding from his regulatory authority trust companies previously authorized to act as such by Tennessee corporate charters, and its later modification by Ch. 112, Public Acts of 1999, to bring the previously-exempt or "grandfathered" chartered trust companies (including Appellant) under the Commissioner's powers for the first time, did such amendment *ipso facto* change the word "bank" to include "trust company" wherever it appears in the Tennessee Banking Act, as desired by the Commissioner, by language merely subjecting the previously-exempt chartered trust companies to the provisions of the Tennessee Banking Act, *(i)* which legislation failed to explicitly expand the defined scope of the Commissioner's seizure powers to cover trust companies as it had done in the past as to some other types of non-banking institutions, and *(ii)* when such legislation **did** explicitly make some of the Commissioner's bank-regulatory powers (but not the seizure powers) **temporarily** exercisable over trust companies for only a 3-year period, which expired June 30, 2002?

2. Did the Court err— (a) in rendering its initial decision declining to issue the writ of *supersedeas* to prevent the Commissioner from transferring Sentinel's valuable trust accounts and subsequently refusing to reverse the Commissioner's seizure and liquidation decisions based upon the Court's acceptance of the Commissioner's contention that he was justified in such seizure actions despite the trust company's showings and insistence that: *(i)* a bank has **always** been different from a trust company, because the identifying quality of every bank is that it is authorized to accept deposits (all deposited money thereby becoming unencumbered property of the bank) which create the debtor-creditor relation, with each creditor-depositor absolutely entitled to withdraw its entire deposit any day, while a trust company holds other persons' moneys in trust, with no rights to disbursement except as provided by the trust instrument; *(ii)* the text of the statute does not by its terms authorize the Commissioner to seize trust companies as distinguished from banks, so that the only possible way the text can be modified to make the word "bank" include "trust company" is through application of the law of statutory construction, which the Court arguably refused to enunciate or apply; *(iii)* statutory law expressly withholds authorizing the Commissioner to seize even a "state bank" without a prior due-process hearing except

where necessary *to protect depositors' interests* from imminent loss, which power to seize plainly is not be vested as to any company which *has no depositors and never had depositors* (including Sentinel), but which only holds large amounts of other entities' moneys in trust for trust settlors and beneficiaries.

(b) In refusing to grant petitioner Sentinel Trust Company the relief it sought by its sworn petition for *Certiorari* and *Supersedeas* and by its actions in: *(i)* denying, by interlocutory order, the writ of *Supersedeas* to prevent threatened transfer of Sentinel's valuable fiduciary accounts upon a clear showing that the Tennessee Banking Act's language only authorized seizure of "state banks", without either adhering to the law of statutory construction, enunciating any statutory construction theory as arguably expanding the meaning of the word "bank" to include "trust company" despite language incompatibilities, or attempting to demonstrate that the law of statutory construction is irrelevant to the task of construing the statute any way a Tennessee executive department wishes it construed; *(ii)* Looking back to the Court's own denial of *Supersedeas* to attempt to justify denial of *Certiorari* relief as prayed (A) in apparent disregard of the U. S. Supreme Court's due process jurisprudence as to the objective minimum required standard of impartiality and (B) upon speculation that its grant might be ineffective as in a past reported decision, despite the fact that there was no evidence before the Court in the *certiorari* trial that Sentinel's accounts actually had been transferred, and despite the fact that Sentinel still owned its real properties that the Commissioner was trying to sell; *(iii)* in light of the fact that the Respondent Commissioner elected to file an answer as permitted but not required by statute, in which the Commissioner did not deny the well-pleaded allegations of Sentinel's sworn Petition for *Certiorari*, including attached authenticated documentation, the Court failed to explicitly hold and give effect to all well-pleaded allegations of the petition as being established by non-denial; *(iv)* in giving no effect to affirmative proof that the Commissioner erred in assuming, without basis in reason or fact, that Sentinel's ***fiduciary assets*** constituted ***corporate liabilities,*** and disregarding the unquestionable fact that the large "accounts receivable" did not represent diversions of funds, but represented a combination of overdrafts and 1½% interest per month, compounded monthly, with such accounts receivable being the property of the pooled trust funds rather than Sentinel, and being more than double the amount of moneys temporarily borrowed, which temporary shortage should be fully recoverable from the assets of defaulted bond issuers over time, as such shortages had been overcome by Sentinel in the past upon liquidation of collateral on the 50 closed-out defaulted issues; *(v)*

disregarding proof of unquestionable accuracy that Sentinel was not insolvent when it was seized, and that it would be impossible to determine whether it would be even indebted to the trust funds until after completion of liquidations on defaulted issues; *(vi)* that the Commissioner was given no statutory authority to enforce fiduciary obligations (the arguable breach of which was the only basis for concern) as to which the judicial remedy is given to trust beneficiaries by T.C. A., Title 35, which the Banking Act gave the Commissioner no authority either to construe or to enforce; and *(vii)* in failing to give effect to the fact that the Commissioner was proven to have exclusive custody of **all of** Sentinel's paper and computerized records, and proof that the Commissioner could easily rapidly check and confirm the truth Sentinel's testimony as to its mode of crediting and debiting accounts, which would have refuted Sentinel's proof had the same been untrue, and the Commissioner failed to offer evidence to show by Sentinel records that its proof was untrue, so that the Commissioner should be held strictly liable for his suppression of such evidence by presuming the same to be contrary to his contentions.

3. If appropriate for decision, whether the statute under which the Commissioner claimed to act, the Tennessee Banking Act, apart from the foregoing, is unconstitutional on its face, because it attempts to vest in the Commissioner, a member of the Executive Department of Tennessee's government, certain powers which may be vested only in the judiciary, including the judicial power to impose receiverships and appoint receivers, and the judicial power to bring about the dissolution of a corporation for insolvency, as well as the legislative power to make provisions of the Tennessee Banking Act applicable or inapplicable to non-banking corporations, at his pleasure.

4. In reviewing *de novo* the decisions of the trial court, whether its decisions should be reversed and the Commissioner's actions adjudged to be illegal and without statutory authorization, and remanded with mandate that the Commissioner be required to do all acts within his powers to undo his seizures in his exercise of such illegally usurped powers and to give an accounting for all moneys converted under his directions.

5. Whether this Court should hold that the Commissioner's actions and the decisions of the Court below were contrary to the explicit constitutional protections secured to Sentinel and its owners as identified and alleged in detail in the petition for *Certiorari* including the State and Federal Constitutional prohibitions against

warrantless seizure of property and against the taking of property without just compensation and the destruction of Sentinel's legal rights without due process of law, without just compensation, and contrary to the law of the land.

II.

STATEMENT OF THE CASE

Nature of the Case:

The judicial case consisted of proceedings upon a petition for *Certiorari* and *Supersedeas* to review actions by which the Respondent-Appellee Commissioner of Financial Institutions (Herein, "Commissioner" or "Department") seized the Petitioner-Appellant's trust company[1] (herein, Sentinel) and all its assets, under the claim that statutory empowerment to seize a state bank also empowered him to seize a state trust company that was not a bank. The entire course of the disputes between the parties included limited-jurisdiction proceedings before the Lewis County Chancery Court claimed to be pursuant to jurisdiction conferred by the bank-seizure statute, presently before this Court *In re: Sentinel Trust Company,* No. M2005-00031-COA-R3-CV, a *supersedeas* hearing in the court below on pure questions of law on the record, followed by an attempt to obtain relief in the U. S. District Court in Nashville, with jurisdiction rejected by it, the District Court stating, in part, "The higher appellate courts of Tennessee, and ultimately the United States Supreme Court, will be the final arbiters of the construction and interpretation of the Tennessee banking statutes at issue in this case. . . . By reason of comity, this Court is not permitted to revisit the accuracy or thoroughness of the states court's decision

[1]All references herein will be to the company itself, although all its directors were co-petitioners, to safeguard against the possibility that the Commissioner might contend that, he having seized the corporation, its directors could no longer control its actions even in defending itself, he having prevented Sentinel's former counsel from conferring with its present counsel.

. . ." *Sentinel Trust Co., et al. v. Lavender*, 2004 U.S. Dist. LEXIS 27259, at p. *30 (M.D.Tenn., 2004), and finally an evidentiary *certiorari* hearing leading to this appeal.

The Pleadings:

Aside from intervening motions and a supplemental *mandamus* petition later abandoned, the pleadings were the lengthy sworn Petition itself, with numerous documents as exhibits and with added supporting affidavits as "attachments" (R., I:1–II:171),[2] and it serves both as the lead pleading and part of the evidence on the *supersedeas* hearing, to which the Commissioner filed the optional response with exhibits (R., IV:393–V:581), as well as filing under seal the administrative record, whose filing was required by the writ.

In its aspect as a pleading, the Petition summarized the pre-seizure procedural steps taken by Respondent with documentation exhibited (Pet., ¶1, R., I:2, ¶ 11, R. I:9); the development of the Tennessee Banking Act from earlier times when trust company formation required only corporate charter provisions, through 1980 amendments requiring all such new companies to have approval of the Commissioner for formation, but "grandfathering" older ones such as Sentinel, finally amended in 1999 to first bring under its application corporate-chartered trust companies previously excluded from the Act's application (Pet, ¶ 2, R, I:2-3); the differences everywhere between banks and trust companies and the attributes of each type of business (Pet., ¶¶ 3-4, R., I:3-4), including Federal regulatory requirements regarding every insured bank's cash reserves; identification of particular relevant statutes with Sentinel's position as to their application (Pet., ¶¶ 5-10, 12, R., I:5-7, 9); alleged state and U. S. Constitutional violations in Commissioner's actions (Pet., ¶ 10, R, I:7-9); Sentinel's mode of doing its business to which the Commissioner objected, with some Sentinel justification (Pet., ¶¶ 13-19, R. I:10-13) ; Sentinel losses caused by its business-seizure (Pet., ¶¶ 20-26. R., I:13-18); the Commissioner's actions interfering with Sentinel's representation by counsel by preventing its former long-time counsel to confer with present counsel as demanded (Pet., ¶ 27, R., I:28-29); the Commissioner's post-seizure actions Sentinel questioned (Pet., ¶¶ 28-29, R., I:19-20), and the lack of any emergency justifying seizure and of any likelihood of losses to any bondholders except as caused by the Commissioner's actions allegedly

[2]Such references are to the volume number and the page number of the record.

without statutory grant of authority (Pet., ¶ 30, R., I:20).

The Commissioner's optional answer, entitled "Response to Petition . . .", with exhibits (R., IV:393–V:581) does not deny *any* allegation of the Petition, but gives a narrative of the Commissioner's theory of justification of his actions, partly summarizing parts of the Administrative Record.

Disposition by Chancery Court:

After hearing on the record and argument, the Court rejected Sentinel's statutory construction rationale and declined to issue *supersedeas* to prevent the Commissioner from transferring all of Sentinel's trust accounts to alleged successor trustees (R., VI:681, 682-694, summarized *infra,* p. 28), and refused to grant a modification or rehearing but did grant a discretionary appeal (R., VII: 819-821), which this Court rejected *sua sponte, Sentinel Trust Co. v. Lavender,* M2004-02068-COA-R10-CV (Tenn.App., M.S., 2004). After an evidentiary trial pursuant to the writ of *Cedrtiorari,* the Court rejected Sentinel's contentions by memorandum opinion (R., VII:921-953).

III.

STATEMENT OF FACTS

Factual framework: Competing contentions.

A brief description of the parties' legal positions is needed so the relevance of particular facts will be obvious. Sentinel served as indenture trustee under over a hundred bond issues, in the service of which it served as a conduit for over $100,000,000.00 each year paid in by bond issuers (including many private activity bond issues)[3] and distributed semi-annually to bond-holders on indenture-scheduled dates. Although each bond fund was separately accounted for on Sentinel's books, the pool of money from all issues was combined in a single

[3]Tax-exempt bonds issued by non-profit corporations (here, health-care related) and sold under the name of cities or counties, not secured by public credit but only by the assets and projected streams of income of each such health-care bond issuer.

"pooled trust fund" account in Sentinel's name at Sun-Trust Bank in Nashville. Just over 60 private activity bond issues went into default due to Federal statutory changes, and Sentinel litigated offensively and defensively to liquidate the collateral of each by charging legal and other collection expenses it has paid against the particular bond issue, causing overdrafts in the pooled fund expected to be fully reimbursed when the collateral was liquidated, and on occasions the overdraft or "account receivable" on a bond issue would exceed $1 million, but Sentinel had first priority upon collateral liquidation for repayment of all fees, expenses, and charges related to the default and liquidation.

The Commissioner claimed that the allowance of overdrafts and carrying the resulting negative balances constituted an illegal use of the funds of many other performing bond issues, essentially as informal loans, to advance the costs of liquidation for defaulted issues, and perhaps that the deposit of all funds of different trusts in a single pooled account was illegal.

Sentinel defensively claimed that *(i)* this was the way banks and bank-owned trust companies always financed such liquidation activities (by allowing overdrafts pending liquidation of collateral); *(ii)* that Sentinel had been so funding its collections for years,[4] with the full knowledge of the then-Commissioner and his Department and without any prior criticism, *(iii)* that it had worked through the collateral-enforcement of over 50 of the 63 defaulted issues, that all 50 had overdrafts which were reimbursed in full when the collateral was liquidated so there was a full repayment of the "borrowed" money in each of those 50 defaulted issues; *(iv)* that some of these 50 overdraft accounts produced accounts receivable over $1 million in amount; *(v)* that this had not caused a loss to any trust fund nor caused any timely bondholder payment to be delayed *(vi)* that such use of trust money (in effect by borrowing) appeared to be authorized by a state statute expressly applying to trust companies and never judicially construed;[5] and *(vii)* that this alleged irregularity was not within the

---

[4]The defaults began about 1998.

[5]The statute, one of six successive code sections, the first of which provides that the word "bank" includes "trust company" wherever used in those sections, is T.C.A. § 45-2-1003(3)(c). It provides in part that "Any bank [trust company] may deposit funds of a fiduciary account awaiting investment or distribution in its commercial banking department or in the commercial banking department of any affiliate bank [trust company] . . . where *the funds may be used in the*

Commissioner's power either to construe[6] or to enforce, because at most it could only be a breach of trust, as to which statutory changes of the common law applicable to corporate trustees had provided for a judicial remedy only and barred a corporate trustee's liability for damages except to the extent that the breach of trust causes losses to beneficiaries, T.C.A. § 35-3-117(i), which admittedly never occurred here.

Factual Summary—Introduction:

There are two documentations of facts: The sworn Petition for *Certiorati,* standing undenied in *any* of its allegations by the Commissioner's response, and the Administrative Record certified to the Chancery Court as required, these together—with concessions on the record—constituting the factual basis for determining the denied writ of *supersedeas*[7] should have been granted. The second factual record is the evidentiary record of the bench trial of the *certiorari* issues, together with some or all of the record appropriate for consideration in the *supersedeas* hearing. In summarizing these, Appellant will seek to minimize repetition except where such proofs are not essentially identical.

---

conduct of its business." (Emphasis added.) Appellant's attorney views this as an anti conflict-of-interest statute that allows a trust company to deposit its funds in a related bank instead of an independent one, However, it is Sentinel's position in this and all related litigation that this unconstrued statute recognizes and authorizes a trust company to *use trust funds in the conduct of its business.* Sentinel has insisted this does not authorize a trust company to **steal** the money but only to borrow the "money" or credit as pointed out to the Court in *supersedeas* argument, (R., XI: 13, l. 15–14, l. 6), while assuring that this does not prejudice the rights of any trust settlor or beneficiary (here, bondholder). A related statute prohibits any bank from engaging in the trust business unless the Commissioner shall have granted it fiduciary powers, T.C.A. § 45-2-1701(a), in which situation the bank essentially becomes both a bank and a trust company.

[6]The Tennessee Banking Act gives the Commissioner no authority to construe Title 35, governing fiduciaries, but by contrast, does give him authority to construe the Corporation laws as they apply to banks and trust companies, T.C.A. § 45-1-174..

[7]The correctness of this decision is no less before this count than is the correctness of the determination of the *certiorari* issues, due to Sentinel's insistence that the Court refused to follow the Tennessee law of statutory construction as the only available body of law that could be used rationally to prove that a statute whose provisions plainly and literally applied only to a "state bank" (as defined) could also be made to apply to a "state trust company" (as separately defined). Its separate relevance, apart from the *certiorari* decision, is sought to be demonstrated in Appellants' constitutional arguments *(infra,* pp. 28, et seq.*)*.

THE *SUPERSEDEAS* AND *CERTIORARI* RECORD FACTS

With the *supersedeas* hearing consisting only of oral argument on the record, Sentinel insists that the detailed sworn Petition is a part of the record, in its most important factual aspects, along with factual concessions by counsel in oral argument,[8] and these will be summarized first.

Concessions—During the *supersedeas* argument, the Commissioner, through counsel, hereinafter referred to as the "Attorney-General," made relevant concessions: First, on the August, 2004 *supersedeas* hearing, when the Commissioner was rapidly moving to sell all Sentinel's bond accounts (R., XI:32, l. 18–33, l. 10), his attorney admitted that Sentinel would suffer immediate harm if the transfer of all its bond accounts were not prohibited by the writ (R., XI:29, l. 25), and that the ultimate consequence of continuation of the Commissioner's course of action would be Sentinel's total destruction by state action: "But, yes, the company will no longer exist. That is what is contemplated under the liquidation statute in Title 45." *(Ibid.,* p. 30, ll.3-5).

Facts: Sworn *Certiorari* Petition—Allegations of universally-known facts[9] were made under oath, included statements that the banking business historically, under the common law, and by statute, is characterized by the bank's acceptance of fungible monetary "deposits" which creates the debtor-creditor relation, with the bank-debtor being obligated to repay its debt *upon demand* for immediate withdrawal or upon presentation of the depositor's checks for lesser amounts, so that the money becomes wholly the property of the bank-debtor, which it may invest for its own exclusive benefit, without sharing or accounting to the depositor-creditor for any part of its profits; and also that the trust company business involves the acceptance of often large sums of money in trust, creating the trust settlor–trustee–trust beneficiary relationships, in which the corporate trustee owns no beneficial interest except for indenture-based rights to receive fees and expense payments, and in which no beneficiary ever has a right to demand withdrawal of any of the trust funds, except at the specific times and in the amounts provided by the trust indenture (Petition, ¶¶ 3-4, 16, R., I:3-4, 11-12).

---

[8]The accuracy of the concessions is essentially indisputable from the evidence, but as concessions should be presumptively binding on that party throughout the litigation.

[9]Such facts should be knowable by judicial notice, because known to all educated persons and to all members of the bench and bar.

The Petition established that after the Commissioner served a statement of charges upon Sentinel's then-counsel, Lansden, Dortch & Davis, PLLC (hereinafter, Waller-Lansden), and that Sentinel, by present counsel, filed a timely special appearance, denying that the Commissioner had any seizure authority over it, responding to specific allegations, and asserting state and federal constitutional objections adequate, *inter alia,* to destroy any claim of jurisdiction (Petition, ¶ 11, R., I:9, and Exhibit H to Petition, R., I:98-110).[10]

Sentinel's mode of conducting its business, particularly in regard to the aspects as to which Appellee Commissioner took his actions of seizure and the ensuing steps, was that Sentinel received large monthly or semi-annual remittances by checks or wire transfers from bond-issuers, which were deposited in a "pooled bond fund"[11] in a single account at SunTrust Bank in Nashville, an FDIC-insured bank, but as to which ownership of the precise amount of each bond fund's remittances and earnings thereon were meticulously recorded on Sentinel's computer-kept books. Each month, Sentinel credited each bond fund holding money with interest earnings in the average daily amount paid to it by SunTrust (Pet., ¶ 16, R., I:11-12) for the number of days in the statement period, so that each fund received exactly the same credit it would have received if no money or credits had been expended from the Pooled Trust Fund. Many of the bond issues were municipal bonds and many were tax-exempt private-activity bonds sold under the names of various cities or counties. After over 60 such health-care firms defaulted in their bond obligations due to Federal law changes which greatly diminished their reimbursement rights and streams of income, Sentinel then began work to liquidate the collateral on each, mostly by litigation (each at the expense of the particular bond-issuer in default). It paid such liquidation expenses from each issuer's bond accounts held on deposit as a part of the "pooled bond fund," with these being recorded as overdrafts as they exceeded cash on hand, and later reclassified as accounts receivable. But the negative balances were fully reimbursed as to each of the 50 issues that Sentinel had worked through to the date of seizure. (Petition, ¶¶ 13-15, I:10-11).

Aside from the Petition's sworn allegations, Sentinel admitted that it would be liable to the bond fund

---

[10]This response prevented the Charges from becoming administratively final, but as to all other actions of the Commissioner, they are by statute reviewable only by *certiorari.*

[11]As described by the Commissioner.

and undertook repayment in the event of any shortfall after liquidation of the collateral in each account, and on April 16, 2003, gave the Commissioner its written undertaking to so be responsible:[12]

> "When assets are converted to cash, the overdraft is liquidated. All trust accounts should hold assets in excess of any temporary cash overdraft. Sentinel recognizes that disbursements for a trust in excess of recoverable assets are to be recorded as corporate expense. That has been and remains it corporate policy."

It was at all times impossible to determine whether there actually would be any shortfall until the completion of all liquidations, and the completion of such litigations was the only way to assure that each bondholder would receive as much of his entitlement as possible from the bond funds (Petition, ¶ 14, R., I:10-11). Sentinel's April 16, 2003 quoted letter to the Commissioner fully described Sentinel's method of temporarily financing collection costs (secured by the pledged collateral) spent from the pooled fund through overdrafts (R., IV:400).

The Petition further established that as to its mode of handling accounts, each month Sentinel computed the average daily interest rate it received on the entire pooled fund, and added the interest at that rate to the positive balance in each bond fund, to pro-rate the interest earned (Petition, ¶ 16, I:11-12). But for each bond account with an overdraft, it was increased by an added charge of 1.5% each month,[13] compounded monthly, so that, as examples of the compounding effect, a $500,000 overdraft would grow to over $717,000 in to over $1.2 million in five years (Petition, ¶ 17, R., I:12).[14] Due to this effect, the accounts receivables, or total owed by all the defaulted issuers was

---

[12]Although the cited letter appears to one of those documents the Department failed to include in the Administrative Record, parts of this letter, including the above quotation, were quoted in the Commissioner's Response (R., IV:400). See, also, the table of contents in each volume of the Administrative Record, stated to be in date-order, which fails to list such April 16, 2003 letter. *(E.g.,* Adm.Rec. Vol. I, preceeding p. 00001).

[13]This was pursuant to Sentinel's long-adopted policy, the most recent re-statement of which was exhibited to the sworn complaint (R., I:111-112).

[14]Although the compound interest facts and figures, including formula, were alleged in the Petition, such is a part of the common knowledge of mankind which every court judicially knows, being available in high school math textbooks.

much larger than the actual amount of this credit temporarily diverted by Sentinel on behalf of those defaulted issuers but as this credit was used, it cost the performing bond-issuers and their bondholders nothing, because each fund was credited with its share of the monthly interest earnings paid by the bank.

The Petition alleged that the pre-seizure May 3, 2004 Cease and Desist Order (not only negatively ordering Sentinel to cease doing a list of acts, but explicitly **enjoining** Sentinel to do apparently-impossible affirmative acts)[15] caused Sentinel monetary losses, including the immediate loss of almost $100,000 in new-business fees (from entities that trusted Sentinel), which forbidden act of doing business had to be passed off to a competitor (Petition., ¶¶ 20-26, R., I:13-18). It further alleged some details of administrative steps by which the seizure was achieved, and some of the Commissioner's post-seizure actions, including the fact that the Commissioner successfully barred attorneys in the firm of Sentinel's long-time counsel, Waller-Lansden,[16] from being interview by their newly-hired present attorney (Comp, ¶ 27, R., I:18-19) to seek those attorneys' recollection about questionable allegations in the Statement of Charges, in which the official summary report of a meeting represented that those lawyers had conceded to the Commissioner that Sentinel's method of temporarily using funds from the pooled trust fund to finance liquidation work was improper, but then asked *if Sentinel could continue doing it, anyway.* (R., I:23-40, at p. 29).

Facts: The Administrative Record —Only limited references need be made to this sealed record, and they are mentioned with the *caveat* that the Commissioner and his predecessors failed to avail themselves of any procedure for making verbatim records of meetings and conferences as

---

[15]These included immediately injecting $2 million cash capitol, and to submitting to him a plan to infuse additional operating capitol (in an unstated amount the Commissioner would deem "adequate") (R., I:47-53 at pp. 52-53,¶¶ 1-2). This amount would perhaps have to be related to the mid-month estimated totals of overdrafts or accounts receivable of $7.25–$10 million, based not upon Sentinel records, but on on-the-spot guesses by Sentinel's president and counsel upon demand in meetings *(ibid.,* at p. 50, ¶¶ 16, 17).

[16]This also alleged, with meticulous detail, why Sentinel believed Waller-Lansden had at least inferentially approved the method as customary.

in adversary situations, so that each such summary is merely that writer's recollections of what impressed him or her, affected by the writer's attitude. One purpose in summarizing parts of the record are to show that the Department of Financial Institutions had known for years—and condoned the practice—that Sentinel was paying its collateral-liquidation expenses on defaulted issues by paying them from the pooled fund and allowing overdrafts in individual bond-issuer accounts against such issuer's collateral, later collected,[17] and that Sentinel's total capital did not even approach the amounts of the overdrafts, at times in the multi-millions of dollars.

Beginning with the initial 1999 examination report,[18] this was issued by the Commissioner's July, 2000 letter to Sentinel (A.Rec. I:0009-0010),[19] which noted that Sentinel had 1999 net earnings over $224,000 out of gross trust department income over $1,359,000. (A.Rec., I:128, 25), that it was trustee of 137 bond issues totaling $586,551,000 (A.Rec., I:18), and was administering 23 *defaulted* bond issues totaling $130,248,000 (A.Rec. I:19). It noted that collateral enforcement costs were being paid *by allowing overdrafts within the pooled fund* against each defaulted bond-issuer, stating that such overdrafts consisted of "fees and expenses associated with defaulted bonds that have not been collected.", that "Cash and overdrafts are reviewed on a daily basis", that "Management works aggressively" and that Sentinel had a "high rate of success in resolving defaulted bonds in favor of bondholders . . ." (A.Rec. I:27). The Department's report transmitted to Sentinel contained no criticism of this practice, but recognized that all management practices and records were under the

---

[17]There is no question but that Sentinel, as indenture trustee, had first priority in its claims for the total amount of each bonded indebtedness against such bond-issuer, and that its own expenses and fees in collecting were given priority by each indenture over bondholder payment rights and bond-issuer refund rights.

[18]Being the first year Sentinel and other charter-based trust companies were subject to the Commissioner's jurisdiction and to his examining power for a period of 3 years after the 1999 enactment.

[19]These references are to the volume and page numbers of the un-numbered 3-volume sealed exhibit constituting the administrative record the Commissioner filed in the Chancery Court. In all subsequent citations, the leading 0's in the Bates-stamping number will be omitted.

direct control of Sentinel's controlling owner Danny Bates, that "Asset management practices are satisfactory . . ." based on Bates' 30 years' experience in this field (A.Rec., I:28) and that Bates has "experience and a positive reputation within the corporate trust community . . ." (A.Rec. I:20).

The Department's year 2000 examination report was issued by the Commissioner's letter of July 17, 2001 (A.Rec., I:42), which lifted a Cease and Desist Order occasioned by a judgment since settled. The litigation was by National Bank of Commerce (NBC), and the report said that it had been known *since March 17, 2000* that a $2+ million judgment *was to be entered* in November, 2000 (A.Rec. I:58), but that the judgment was actually entered January 21, 2001; that the Commissioner promptly presided over settlement negotiations between the parties and judgment was entered on February 21,2001 by Davidson County Chancellor Kilcrease, vacating the judgment and approving a $575,000 settlement.

It noted that Sentinel's 2000 net income had increased to $464,000 out of a gross income of $1,268,000, that Sentinel was now administering 26 defaulted issues totaling $174,505,000, and that 2000's liquidation expenses of $3,602,161 were "reflected in overdrafts within the respective accounts with management expecting full recovery." (A.Rec. I:60). It further said that "Overdrafts consist primarily of fees and expenses associated with defaulted bonds that have not been collected.", that "Cash and overdrafts are reviewed on a daily basis.", that "Overall account administration appears generally acceptable and the company complies with the governing account instruments. . . . Account document is generally satisfactory . . ." , prefacing these comments with a summary statement that "The company continues to have a high success in resolving defaulted bonds in favor of bondholders." (A.Rec., I:76). It said that owner/President Bates "retains virtually unrestricted access to the computer system." and was responsible for all investment decisions and "for documenting all transactions." It contained no criticism of the use of the credit within the pooled funds as a temporary source of cash to fund collateral-liquidation expenses expected to be recovered from each defaulted bond-issuer's collateral, with Sentinel recognizing its obligation to pay any deficiency.

The 2002 examination was commenced on April 22, 2002, and by the time of its completion, former Commissioner Houston was been replaced by the Respondent Commissioner, who issued the report with his letter of February 4, 2003, for the first time expressing Departmental dissatisfaction that Sentinel's counsel "could not establish a specific [eventual] monetary amount of loss, if any . . ." from the overdrafts, by then labeled "accounts receivable," and stating that Sentinel's "management is asked to provide information . . ." on "how those overdrafts are being funded."[20]

The Department in 2003 first enunciated and communicated its view of advancing funds from the pooled fund (at 1½% per month, compounded monthly)[21] that "the funds of one bond issue are not to be used for another bond issue . . ." (A.Rec. I:134-135). It noted that newly-injected $800,000 capital (with no source mentioned) had been used (A.Rec., I:158) to pay the 2001 $575,000 litigation settlement (described *supra,* p. 16), and that an accounting firm's audit for the year 2002 (received after November, 2003), reported that the collateral-liquidation overdrafts, now accounts receivable, totaled around $7.5 million, as to which the CPA firm opined that the "amount of [Sentinel's] liability, *if any,* . . . not presently determinable." (A.Rec., I:173).

The Commissioner made a criminal referral in April, 2003 against Sentinel owner Bates to county district attorneys (A.Rec. II:229-234), to which only the Davidson County District Attorney responded, by letter declining to prosecute (A.Rec II:235-236). Mr. Bates wrote a series of

---

[20]Bates' April 16, 2003 letter was likely response to this request, and fully explained the system, as previously disclosed repeatedly to the Department. That is the letter the Commissioner partly quoted in his Answer but failed to include in the Administrative Record *(supra,* p. 12).

[21]The Department and its personnel never indicated (nor does the Administrative Record or the Petition indicate) whether Waller-Lansden had any conscious knowledge of the interest charge) that the Department had understood this was a profitable interest-compounding practice benefitting the fund, although it had for years been part of Sentinel's policy until it was spelled out in the Petition for *Certiorari,* although any observer reading in the statement of fees and charges that the balance of each unpaid account (overdraft) was increased by 1½% each month would immediately perceive that this is **the** methodology for compounding interest charges on an account. The formulas are used only as a short-cut to totally accurate computate the compounding effects over a time period of any desired length.

responsive letters to the Department's Examiner Lamb explaining details she had not understood (beginning A.Rec. II: 253, 255, and 287).

Examiner Lamb wrote Respondent on September 26, 2003, that she still hadn't told Bates that Department's planned to issue a Cease-and-Desist (C&D) order (A.Rec. II:291). As an indication of urgency, Ms. Lamb recorded the time as after midnight on September 30, 2003 when she wrote a memo to the Commissioner with a requested report (A.Rec, II:293,294-299). Five months later, Ms. Lamb submitted a "Plan of Action" memo to the Commissioner on February 23, 2004, giving her summary of a departmental meeting held the previous Friday; that it anticipated the receipt of a CPA report, and said that if it shall opine insolvency, "we will make a capital call and issue an order to stop accepting business." (A.Rec. II:300-304), as predicted 5 months earlier and actually issued the following May *(supra,* pp. 17, 21).

That order was followed by various communications to the Department from Sentinel or Waller-Lansden (A.Rec., II:339-340, 344-369), culminating in Waller-Lansden's May 6, 2004 letter to Sentinel's Board of Directors recommending that Sentinel's owner Bates immediately resign as President and the Board replace him by Monday, May 10, or Waller-Lansden would terminate its service as Sentinel's counsel (A.Rec. II:370). The next identification of attorneys representing Sentinel comes in a letter of May 4, 2004, from the Department's internal attorney to "Katie" Edge, of Nashville law firm Miller & Martin, enclosing copies of two earlier Waller-Lansden letters and asking Ms. Edge to explain a perceived discrepancy. (A.Rec. II:393).

This was followed by a series of communications between the Department and Miller & Martin, the latter mostly supplying required information or documents (A.Rec. III:423-452). But these also included several requests Miller & Martin made for Sentinel: A request for Sentinel to be permitted to transfer two defaulted bond issues to substitute trustees appointed by those bond-issuers (A.Rec., III:423-424), which the Commissioner denied (A.Rec. III:428), a request for permission to employ Nashville law firm Williams & Prochaska to continue working on a new action in a conflict it had been handling for Sentinel (Denied, A.Rec. III:452), and a request (with stated reasons) to

terminate two executive employees, James A. Skinner and Paul Williams[22] (Denied, A.Rec.III: 446-448) stating, *inter alia,* that Waller-Lansden's earnings from representing Sentinel totaled over $3,971,175.38 (A.Rec. III:446-448), which legal work Miller & Martin would now handle less expensively.

Department Attorney Miller wrote a file memo of a meeting on May 17, 2004—the day before the Commissioner seized Sentinel—between Miller & Martin Attorney Mary Neil Price and the Commissioner and other Department personnel (A.Rec. III:453-455) giving her impression of what Ms. Price said [23] about Sentinel's operation, in which every action since the Stay Order had to be on legal advice. She related that the Commissioner inquired how much money Mr. Bates could put up "today," and said Ms. Price reported (after making a phone call) that Bates could put up $25,000 today and $200,000 in 30-60 days, adding: "If Miller and Martin is running the company, the Commissioner asked what Danny was doing in the office. MNP said he was basically there answering questions." (A.Rec. III:453).

It also contains a copy of a letter from Waller-Lansden to Sentinel's litigation attorney herein, refusing to be interviewed as Sentinel's former counsel (A.Rec. III:597-598), and Kilgore's responsive letter to the Commissioner insisting on the right to talk to Sentinel's previous lawyers for the purpose of defending Sentinel against the Commissioner's actions (A.Rec. III:321-622).

FACTS: THE *CERTIORARI* TRIAL

Facts: Relevant Concessions and Representations by Counsel —Important concessions

---

[22]Mr. Skinner contracted to oversee the massive amounts of litigation from the 63 defaulted bond issues, he recommended Waller-Lansden to represent Sentinel,.and Bates employed Mr. Williams, who issued and signed all checks from the Nashville office for attorney fees and other such expenses.

[23]"MNP said the only person with access to Sentinel's books has been Danny [Bates], and he is not an accountant. She said the Miller and Martin firm is basically running the company and instructing Mr. Bates on what to do." (A.Rec. III:453).

and representations to the Court by the Attorney-General, during witness-examination or in statements to the Court during argument, included:

- The Attorney-General conceded that had the Commissioner not seized Sentinel, Sentinel would have continued making all scheduled disbursements to bondholders as required, but only by continuing using the pooled fund (R. XIV:525), and could have continued making those payments as long as the money kept coming in (R. XIV:517).

- The Attorney-General conceded that Sentinel had never yet failed to make timely required payments to bondholders. (R. XIV:514).

- The Attorney-General represented that at trial time, there were only 7 remaining defaulted bond issues still open,[24] and the collateral had been collected on 3 of these, awaiting distribution upon court-approval. (R., XII:16-17)

- Following Sentinel's statements, in colloquy, that although a Lewis County court had given its November 15, 2004, approval of the transfer of *all* Sentinel's "performing accounts" to successor trustees, Sentinel indicated disbelief that *the money* had been disbursed by the Department (R. XI:247-248),and the Attorney-General then represented to the Court that "the **assets** Sentinel was holding in fiduciary capacity for the benefit of those bond issues, as well as all the books and records, . . . [were] transferred . . . as of December 15, 2004." This is important as indicating the Department may have misled the Attorney-General, because it was proven that in fact, a considerable amount of the cash was not transferred *(infra.*, pp. 28-29).

Testimony of Witnesses —All witnesses were called by Sentinel, and the Commissioner called none. It should be noted that the Commissioner's actions in preventing any Waller-Lansden

---

[24]Of the 13 open still awaiting collateral liquidation on the date of seizure *(supra,* p. 24)

attorney to be interviewed by Sentinel's present counsel, and Waller-Lansden's position in honoring this insistence, resulted in the examination being without any prior opportunity to interview the witness. Testimony is summarized in witness order, with every attempt to avoid repetition, partly by grouping testimony on the same point, whether from direct- or cross-examination, unless the source of the question be relevant.

David E. Lemke, one of two Waller-Lansden attorneys subpoenaed by Sentinel,[25] is expert in bankruptcy law (R. XII:58), his work with trust companies had been limited to those owned by banks (R. XII:87) and he had only 2 months' involvement[26] in problems of Sentinel–Department relations (R. XII:48). He had learned of Sentinel's method of financing liquidation expenses through overdrafts in April, 2004 during a meeting with Waller-Lansden Attorney Buchanan and Sentinel's Paul Williams (R.XII:L68-75) before his and Mr. Buchanan's April 28, 2004 meeting with the Commissioner (R.XII:47) as alleged in the Statement of Charges (R.I:29-30, ¶¶ 14-15).

He testified that such financing by allowing overdrafts was no problem with a trust company owned by a bank, in which bond defaults were the most profitable part of the business (R. XII:87), and he had much experience with such trust companies using overdrafts to support liquidation costs, with Sentinel having problems only because of its small size (R. XII:91). Banks in such situations set up an asset account in the trust department matching the overdrafts, but he did not answer a question about whether instead of this simply being a paper transaction by which the bank switched some of its asset accounts into the trust department without expense, a bank would actually bundle up $7 million cash in a box in its vault, foregoing interest (R. XII:88).

---

[25]Attorneys Lemke and Alex Buchanan were subpoenaed, and after the Court took up motions to quash, it invited a conference between them and the Attorney-General to see if she really had any objection, resulting in agreement that Mr. Lemke could testify as the sole witness from Waller-Lansden.

[26]As shown elsewhere, Waller-Lansden's representation of Sentinel hd been handled by its partner Ames Davis *(infra,* p. 28).

He testified about occurrences in the meeting of April 28, 2004, with the Commissioner,[27] the actual response was that Waller-Lansden could not render an opinion on this (R. XII:53) and that they did ask if Sentinel could continue the practice because it did not have the money to fund the full amount of the overdrafts. He identified a memo by Mr. Buchanan of what occurred in the meeting, (Exhibit 4), and confirmed the accuracy of all its factual statements, including the Commissioner's refusal to permit the transfer of two defaulted bond issues $220,000.00 related cash to an already-appointed substitute trustee, that the Commissioner had said Sentinel would have to infuse about $6-10 Million additional capitol, that it must immediately stop its overdraft-financing practice (R. XII:50-51), and that the Commissioner's April 28 statement of his planned requirements[28] included one that Sentinel "develop a plan of operations to be agreed to by the Commissioner whereby *it winds down its operations and ultimately ceases operations.*" (Ex. 4, ¶ 6)

In reviewing Sentinel's practices, he was not aware of the standard 1½% monthly compounding charge against overdrafts and its multiplying effect, which Bates had never mentioned to him[29] (R. XII:65-66), and that in studying the overdraft issue, he understood the amount to be around $2.5 million, not $6-8 million.[30]

He testified it was his opinion that a trust company was under no obligation to use its own funds to carry out the liquidation obligations, but that if it failed to perform this duty it would face

---

[27]In which the Department's memo-writer (and the subsequent charges) had said that the attorneys admitted that the financing method was inappropriate but asked if Sentinel could continue doing it anyway.

[28]This part of the Commissioner's plan could not be and was not implemented in the May 3, 2004 Cease and Desist Order (R., I:52-53, ¶ 2), and after Sentinel ceased to be able to take any actions by virtue of the seizure on May 18, 2005 (R. I:56) he could no longer enjoin such affirmative action.

[29]Bates' testimony indicated he perhaps did not consciously appreciate its importance, because his was a "transactions business." *(infra,* p. XXX), so it is possible that even **he** did not consciously appreciate the multiplying effect.

[30]He did not testify if this would make any difference, and why.

bondholder litigation against it (R. XII:83-86), that before April 28, 2004, Waller-Lansden had researched the issue of whether such funding through overdrafts was lawful, but had found no judicial authority construing the statute allowing trust companies to use trust funds in their operation (R, XII:51-52), that the issue might still remain open (R, XII:93), and that the only way Sentinel could "document" the legality of such mode of financing, as required by the Commissioner, would be with a legal opinion (R, XII:92-93). Also, various documents Waller-Lansden supplied to the Commissioner as demanded had been prepared by Sentinel's Paul Williams and reviewed by his firm (R, XII:70, 75, 80-81).

Robert V. Whisenant, C.P.A., had executed duplicate detailed affidavits previously filed in the Federal Court and the Lewis County Chancery Court, and a copy of it, received in evidence (R, XII:37) without objection (Ex. 5), most concisely sets out his qualifications and opinion, including the fact that he has testified in many cases, is a member of a Nashville accounting firm, has been appointed by chancery courts in Tennessee because of his expertise, and is the president (then, president-elect) of the Tennessee Association of Certified Public Accountants.

Mr. Whisenant had 25 years in auditing companies in the mortgage banking business, from an accounting viewpoint the reverse of the trust company business (R. XII:96-97). He testified that the Quick-Books system used by Sentinel is an accepted and reliable double-entry book-keeping program widely used in business, as was the Quatro-Pro spread-sheet software used by Bates to make the monthly compounding computations for entry (R. XII:97-100), that he considered Bates' letter to the Commissioner by which Sentinel admitted liability for the remaining short-fall, if any, after liquidation of all collateral on all issues, and that the documents considered by the Commissioner did not justify an assumption or a conclusion that Sentinel was then insolvent. (R. XII:108). He testified that the overdrafts and earnings thereon were Trust Department *assets* and that there was no possible way in accounting that they could be classified as a corporate *liability.*(R. XII:109). "To really know what it was at the end of the day, you would have to, as you said, settle all the lawsuits, handle all the bankruptcies of the bond issuers and collect all the moneys and disburse and at the end

of the day either you had moneys in excess of your obligations or you did not." (R., XII:106).

He reviewed two Bates affidavits attached to his own describing practices and data, with Bates' computation that within the $7+ million accounts receivable, the moneys actually spent totaled $3+ million and testified that at the end of each month it would be quite easy from bank statements to determine if there was enough cash in the pooled trust fund to pay the following month's bondholder payments (R., XII:106); that Bates' methodology of each month crediting to each solvent bond account the average earning rate of the entire fund was the proper accounting method and that the addition of those positive balances was a sound way to determine how much money *should be* in the pooled account (R., XII:136), and that if at the end the interest had produced a greater amount than should be there from totaling positive balances, this would be a windfall for bond issuers (R., XII:97); that it was proper for Sentinel to charge its earned fees as a part of the negative balance without paying them out pending receipt of funds from the bond-issuers collateral (R., XII:112); that it was a proper accounting practice for Sentinel to enter in its computer accounts the correct amount of money owned by each entity in the pooled account (R., XII:115); and that on the day of seizure there was no possible way the Commissioner could accurately determine that Sentinel was insolvent (R., XII:116). He testified that it was very common for businesses with cash flow problems to have daily fluxuations in the amount of cash (R., XII:116); and that "... especially post '86 Tax Reform Act where companies that were involved in real estate were constantly struggling with cash flows, a lot of those businesses today who were questionable as going concerns at that time are successful and doing well today, so it's really very, very difficult to take the position or to really know if a company is going to fail or not." (R. XII:117).

On cross-examination, he explained very carefully why Sentinel in fact had no cash flow problem (R. XII:136-137); that when the collateral proceeds came in, Sentinel would have first claim to them (R. XII:141), that if any Sentinel unpaid fees were included in an overdraft that was never collected, this would have to be written off as a bad debt (R. XII:143); and that a trust company has no depositors' interests to be protected (R. XII:146).

Beverly Horner, CPA, the accountant with the Krafft accounting firm who actually did the work on auditing Sentinel (R. XII:158), testified that Krafft could not opine about the accounts receivables because they could not be verified by ordinary accounting methods (R. XII:160), but that Sentinel's balance sheets were in balance on the audit, and they were simply unable to establish the value of receivables (R. XII:162).

Danny Bates, controlling stockholder and president of Sentinel, after graduating from college and working a year as a teacher, had become an analyst within the C.I.A. stationed in Viet Nam, with top secret security clearance and he retained his security clearance, but less than top secret, with both the C.I.A. and the F.B.I. after resigning from the C.I.A., when he began working for Commerce Union Bank. After being in charge of trust investments with that bank in 1973, he left it and purchased Sentinel, an existing corporation which was a Tennessee trust company[31] granted the status by its certificate of incorporation (R. XII:168-169) to establish his own trust business.

He testified in some detail about the first trouble Sentinel had before the group of defaults in the health-care industry, a situation in which an investment advisor named Namor had overseen a group of private-issue bond issues that were fraudulent in that the securing insurance instruments were fake, he discovered the fraud and reported it to the FBI, he cooperated with the FBI and the U. S. Attorney in Memphis with the result that Namor and a number of associates were convicted and given long prison terms, he caused Sentinel as trustee to declare the bonds in default, a multi-million dollar amount of some of those issues was owned by National Bank of Commerce, which used its post-default position as owner of the bonds to remove Sentinel as trustee. (R. XII:171-176), this having led to NBC's successful litigation against Sentinel in the Davidson County Chancery Court.

The 63 health-care bond issues began going into default at the end of 1996 (R. XII:178), caused by changes in Federal law (R. XII:178-179), 50 of these had been worked through by Sentinel before the seizure, and *every one of those* had negative balances in its accounts, some in excess of

---

[31]The Commissioner recognized that it was a state trust company newly brought under the Banking Act by the 1999 legislation.

$1 million (R. XII:203), but the full amount of the receivables, with all included interest charges, was collected on every one (R. XII:203), so there was no monetary loss in the use of the pooled fund's credit.

He knew, from his days at Commerce Union, that trust departments and trust companies used overdrafting to temporarily carry the costs of liquidating secured defaulted bond issues (R. XII:234), he handled all of Sentinel's book-keeping with the Quick-Books system and a separate system for bond issues reports, AccuTrust, and at every *month-end* the two systems agreed with the double-entry Quick-Books serving to determine the accuracy of balances, and he handled the book-keeping the same way both before and after the Namor difficulties (R. XII:182).

The system was that all deposits of bond funds would be made into the pooled fund account in Sentinel's name, but on Sentinel's Quick-Books, the exact amount owned by each bond fund would be recorded with the name of its owner, securities would be held by SunTrust as Sentinel securities, but with the ownership of each shown on Sentinel's books (R. XII:199), and on many individual bond issues there a number of separate funds, each kept separate on the books (R. XII:199), with examples (R. XII:199). The computer records (Quick-Books) at all times showed the ownership of every amount in each separate account, these included accounts belonging to Bates and to Sentinel (R. XII:243), and Bates did not consider this "mingling" because it was his understanding there was no mingling unless there was a loss of identification of ownership (R. XII:295).[32]

---

[32]As an explanation of ownership records, concerning securities, many held for the entire life period of years of a bond issue, they were held in a separate securities account at SunTrust, apart from the pooled fund, the ownership of each security was shown on Sentinel's computer records, but on others records, SunTrust records showed them as Sentinel-owned, as to the actual securities instruments, most would be held in street names by Depository Trust Company, which is the actual custodian of most of the nation's securities, its records would show them owned by Hilliard-Lyons or other brokers, their records would show ownership by Sentinel, and Sentinel's records would show actual beneficial ownership as particular trust funds, Sentinel, or Bates (R. XIII:Bates12k).Upon a cross-examination question about where the paper security records were kept, he testified they were in Sentinel's files in the files marked Cherokee Securities, Hilliard-Lyons, or Morgan-Keegan (R. XIII:309).

Under the Sentinel agreement with SunTrust, $350,000.00 was held without drawing interest, but at the end of each banking day, all above this was "swept" into the general market funds where it earned market-rate interest overnight for the day or period of days until the next banking day (R. XII:192-193), and at the beginning of every banking day, SunTrust sent Sentinel an interest statement showing the amount so invested, and the amount and annualized rate of interest earned (R. XII:192-193). At the end of each statement period, Bates would enter the different interest rates and number of days and a computer program would accurately compute the average daily interest rate, and he used the Quatro-Pro spread-sheet program to credit the average daily interest rate for the number of days to each account with a positive balance (R. XIII:436), but no interest was credited to accounts of Sentinel or Bates, which realized no income on their accounts. At the same time, the program added 1½% interest to each negative-balance account (R. XII:201), and this was done by the computer automatically by its program depending upon whether each account had a positive or negative balance (R. XII:190). Aside from monthly posting, he paid little attention to interest because his was a "transactions" business (R. XII:197).

On the settlement of the NBC $2+ million judgment for $575,000 under the direction of previous Commissioner Houston *(supra,* p. 15), he contributed $1.2 million to Sentinel by selling securities in his account[33] and transferring the money from his account within the pooled funds to Sentinel's account (R. XII :230, 358, XIII:281-285,294), but in tax return preparation the following year, this was re-classified from being a loan to Sentinel to being a contribution on the advice of Sentinel's CPA (R. XII:229). The pooled account, held in Sun-Trust at the end, had been held in different banks at different times,[34] but with actual ownership of all funds accurately recorded at all times on Sentinel's books (R. XII:184).

---

[33]This securities account was held jointly in the name of Bates and Sentinel Service Company, his wholly-owned corporation used to hold ownership, as of the real property where Sentinel's office was situated (R. XII:).

[34]For example, use of the Commerce Union account, which became NationsBank and later Bank of America, was terminated when Bank of America decided at the end of 2002 that it did not want that business (R. XII:284).

It was impossible actually to keep daily records (instead of up-dating at the end of each statement period) because the difference in dates of appearance of deposits on Sentinel's and the Bank's records, where SunTrust by computer program automatically credited the amount available on each deposit by different percentages of it according to the number of days since deposit (R. XIII:198),[35] and because even if the data were available, its entry would require a large number of employees and the purchase of banking-record software at over a million dollars' cost (R. XII:198).

After collateral-liquidation of each defaulted account, the deposit of an amount equal to the entire negative balance was placed in the pooled fund, including any unpaid fees (R. XII:206), and although Sentinel charged fees on the trust-side books as they accrued, they were not actually paid and entered as receipts on the corporate-side books until collection made the money available (R. XII:408). Upon collection, the total of all the accrued 1½% interest charges remained in the pooled fund without assignment of ownership to any particular bond fund (R. XII:206),[36] and if there should remain an excess from the interest earnings, this would belong to all contributing bond-issuers on a pro-rata basis (R. XII:215).

In recognition of Sentinel's liability for any remaining negative balance upon completion of all liquidations, on one occasion of transferring a defaulted bond account to a substitute trustee, Sentinel had issued its check from its separate corporate account for the amount of the negative and deposited it into the pooled fund (R. XII:218).

As to the allegation in the charges that he had not promptly reported the granting of the summary judgment to NBC against Sentinel (actually to be entered at a far-off future date), he reported this to former Commissioner Houston the day the information was finally communicated

---

[35]This was required by a change in federal legal requirements to replace the banks' prior system of holding all funds as "uncollected" for a fixed period of days (R. XII:196).

[36]This is because the deposit of the entire collection into the default bond-issue's account overcame the negative balance classified as "accounts receivable" and left the remaining cash in the deposit for distribution to bondholders after deduction of any liquidation expenses not previously charged.

to him by Waller-Lansden's Ames Davis (R. XII:226-227), and with the long duration of the liquidation work, he later transferred to Sentinel his ownership of the buildings occupied by Sentinel in Hohenwald and Nashville (R. XII:231-232), but at all times, Sentinel's cash income actually received was sufficient to pay all Sentinel's operating expenses and salaries (R. XII:233), so that at the time of the seizure, Sentinel owed no money except current bills (R. XII:232)

Upon the Attorney-General's representation to the Court that all the performing trust accounts, with related assets, had been transferred to successor trustees, as authorized by the Lewis County Chancery Court, on December 15, 2004, Sentinel's counsel expressed disbelief that the money had been transferred,[37] at least without the Commissioner retaining the power to recall it, and the Attorney-General then represented to the Court that all the bond "assets Sentinel was holding in fiduciary capacity" had been transferred to successor trustees "as of December 15, 2004." (R., XII:246-247, 248).[38]

Immediately after this, Mr. Bates testified he knew the money had not been transferred, Mr. Bates testified he had personal knowledge that the money was in the Sentinel SunTrust account in Nashville after December 15, 2004 because he received a Sentinel daily investment-interest statement from SunTrust around Christmas, 2004, showing a balance in the pooled account of $2.1 million, which with the $350,000 uninvested minimum, would make about $2.4 million, about the balance in the account when the Commissioner seized Sentinel (R. XII:250). The receipt was produced and filed (Exhibit 12), showing that account No. 4049233 as of December 23, 2004, had a daily-invested balance of $2,112,345.04, that being the number of the account holding Sentinel's

---

[37]The claimed materiality of this was stated also, "Whether the money has been actually transferred to the Oklahoma Bank and to SunTrust down in Georgia is part of the picture of just how much without a remedy Sentinel might be at this stage, because we know its real property still exist." (R., XII:249).

[38]This occurred after Mr. Bates testified the Receiver's most recent report showed collateral-liquidation receipts of $7.9 million (R., XII:246).

pooled fund (R., XII:251).[39]

In actual handling the money, Mr. Skinner and his company, placed under contract to handle the work-outs, was highly skilled in that area (R. XII:221), he would approve for payment all valid liquidation-expense bills, and pass them to Sentinel's Vice-President Paul Williams, who in turn approved them and issued and signed the checks (R. XII:222), and copies of all deposit records and checks issued were faxed each day to the principal office in Hohenwald (R. XII:222), where Bates and an employee would enter the identical data in the Quick-Books and Accu-Trust systems (R. XII:222, 201). Bates had hired Williams for the position at Sentinel (R. XII:234), and Williams was the Sentinel employee the Department chose to retain for continuity after seizure, upon internal recommendation (A.Rec, II:304).[40]

Mr. Bates also testified that as of the date of seizure, the fees for future payment to it by bond-issuers totaled around $15-$16 million if all defaults were cured, which would produce a present value of Sentinel's accounts of around $10 million.(R., XII:225) at 8% discounting, and that Sentinel complied with all negative commands of the Commissioner's order, but would not obey the affirmative order to put up $2 million immediately (R., XII:253).

Facts: Statements by the Court —such statements are important for determining the

---

[39]If the Court can take judicial notice of official Tennessee public records, the Commissioner's annual report to the Governor showed that the Department's mis-statement was far greater than indicated by the hearing transcript, because that report showed that as of December 31, 2004 he was still holding cash in Sentinel trust funds of $2,462,793 (confirming the accuracy of Bates' mental computation above) in the "pooled demand deposit account" and $4,729,156 in defaulted bond account moneys in another deposit account, totaling $7,191,949

[40]Paul Williams may have been the source of the Department's obvious mistrust of Danny Bates, because he had come to believe, without ever stating any basis, although he worked exclusively in the Nashville office (R. XII:), and had no contact with the book-keeping entries that kept up with account ownership, nor of the checks issued in Hohenwald, which were selected by Mr. Bates for printing from a check-issuing register within the Quick-Books system (R. XII:). The critical opinions Williams evinced having formed were proven by a series of vitriolic e-mail messages he sent from his home computer to Departmenal Examiner Lamb (A.Rec., I:167, 179).

Court's lack of credibility determinations for this Court's decision *de novo* consideration, as indications of the Court's thinking, and/or as relevant to the constitutional issues. These include the Court's statements *(i)* that the legal statutory construction issues had been "resolved, at least by this judge, against you [in the *supersedeas* decision]."(R. XIV:489), but *(ii)* that the issue was whether an emergency existed "which will result in serious losses *to depositors.*" (R. XIV:489; emphasis added); *(iii)* that Sentinel's counsel could well argue the favorable testimony of the C.P.A. that Sentinel was not insolvent (R. XIV:498); *(iv)* that the standard for determining if the Commissioner is authorized by law to take possession of a state bank *without a prior hearing* is whether an emergency exists that will result in serious *depositor losses* (R. XIV:512); *(v)* Upon the Attorney-General's statement that non-seizure would have resulted in Sentinel continuing using trust funds, the Court stated that the Commissioner couldn't seize a bank "to stop an illegal practice." (R. XIV:525); and *(vi)* the Court's statement, in colloquy, that the emergency here was not like a run on a bank in which many depositors would lose their money (R. XIV:528).

IV.

SUMMARY OF ARGUMENT

Because, as in the related Lewis Equity case of *In re: Sentinel Trust Company,* No. M2005-00031-COA-R3-CV, the many basic points of law involving Constitutions, Statutes, a bench trial, and basic issues of power are so intertwined, the most orderly way to discuss these is to explore important parts of substantive law and to refer back in the discussion of each appealed question for the understanding so offered to the Court, because some of the questions raised on appeal are almost self-answering.

These legal and factual issues include: Did the Commissioner have the power at all to exercise bank-seizure powers over a non-depository trust company? Aside from this, did he withhold action pending his affording a constitutionally-secured prior hearing? Apart from constitutional considerations, did he meet the statutory requirements for acting destructively without a prior

hearing? Did he make the necessary findings without which he is not even colorably authorized to take such actions? Was there any rational basis for **assuming** that Sentinel's acts were Banking-Act violations, and for treating its **fiduciary assets** as corporate **liabilities?** Is there any possible way to demonstrate that a statute purporting to empower him to take acts against **a state bank,** a phrase with a common and understandable meaning for centuries, empowers him to use those same powers against a totally different type of entity, a **trust company,** if the answer is provided by thinking that uses the only legally-approved rationale for answering such a question, the law of statutory construction? In answered right and by law, Appellants firmly believe that each can only be answered against the Commissioner's destructive seizure and exercise of powers.

For comprehension of this case's more narrow points, the broad subjects that merit preliminary descriptive discussion (because no one keeps such details constantly in mind) are universally-known legal knowledge about Sentinel's practices in handling money and an understanding of the Tennessee Banking Act's organization and provisions, as read in accordance with statutory construction law. And because this case is far broader than related litigation, discussion must be slightly more extensive.

V.

ARGUMENT

SENTINEL'S FINANCING PRACTICES

Bates testified[41] that allowing overdrafts was a common part of the trust business, and the thought immediately inspires some revulsion in all in the judicial–legal world schooled in common-

[41]Also, Sentinel's vice-president whom Department's receiver later hired, Paul Williams, wrote his investigative memo to Sentinel's president affirming as legitimate and customary the practice's acceptance within the industry.

law equity's bar against a trustee's either mingling or borrowing trust funds. Hence, the likely legitimacy of these practices within the larger professional world of corporate trustees handling huge amounts daily is quite important, with the small Sentinel Trust Company's acting as trustee-conduit for more than $100,000,000 annually.

Bank robber Willie Sutton said he robbed banks because that's where the money is. But of course, a bank's cash on hand is a small portion of its credits, with controlling statutes making FDIC-insured banks have cash reserves in the maximum percentage (after a "small" basic amount of $25 million in deposit transactions) administratively set in the range of 8%–14% of transactions with a default 12% rate, or deposits, with all of the cash reserve but "vault cash" deposited by the bank in a Federal Reserve Bank, 12 U.S.C. § 461(b)(2), and the primary part of every bank's business is lending money *it doesn't even have.* It receives (and owns) deposits as a debtor, *Wagner, Trustee v. Citizens' Bank & Trust Co.*, 122 Tenn. 164, 122 S.W. 245 (1909), and T.C.A. § 45-1-103 (2), (9), and (10), and its authority to lend to any entity has no relation to the deposits used by it but is limited to a modest percentage of its capital, T.C.A. § 45-2-1102. There is no statutory limit on amounts any bank may lend based upon the total of its borrowed deposits.

An accepted classical description of this common business arrangement says, in part:

> "The current accounts may be withdrawn on demand, that is to say, without previous notice. Often no interest at all is paid upon them, but when interest is paid, it is lower than that on the investment deposits. . . . It is a matter of indifference how they do this [lend money], whether they actually lend out a portion of the deposited money or issue notes to those who want credit or open a current account for them. The only circumstance of importance here is that the loans are granted out of a fund *that did not exist before the loans were granted."* (Emphasis in the original.)[42]

That is to say, banks create money-equivalents by issuing checks or "depositing" non-existent money in accounts within the bank, and this daily but hazardous practice comes home to roost upon the

---

[42]Mises, *Theory of Money and Credit,* pp. 270-271 (Repr. 1971, Foundation for Economic Education, Inc.). Ludwig von Mises was the teacher and mentor of Nobel laureate Freidrich A. Hayek, and with the Nobel Prize awarded only to living persons, Hayek's prize is regarded by much of the world of scholarly economists as a post-mortem tribute to Mises, Skousen, *The Making of Modern Economics*, 293 (Sharpe, New York and London, 2001).

sudden occurrence of a depression or deep recession, when there is no actual money to back up the accounts. So bank-owned trust companies can easily allow overdrafts for trust-enforcement expenses which the bank can automatically offset by assigning credits to a depository account for its trust department, the wealth in that account is essentially non-existent, though treated as money and though convertible to cash in good times.

Although a free-standing trust company lacks this money-creating power, as a practical matter, it can advance money by allowing overdrafts without any real difficulty because of the millions of dollars flowing through its pooled fund of trust moneys, yet not disbursible except upon semi-annual payment dates spread throughout the year, as explained by Whisenant *(supra,* pp. 23-24).

Whether this is actually lawful or not is not an issue in this case because, as accurately alleged in the *certiorari* petition, it is at most a possible breach of trust, the judicial remedy for which does not authorize the imposition of any monetary liability on the trustee except to the extent that it causes trust beneficiaries to have their disbursement entitlements missed or delayed, T.C.A. §§ 35-1-101, *et seq., particularly at* 35-3-117(i), the Banking Act gives the Commissioner authority to construe the Banking Act and also the Corporation statutes, as they apply to banks and trust companies, T.C.A. § 45-1-124, but gives him no authority to construe or enforce the Title 35, although it subjects all Tennessee trust companies and banks to its provisions, T.C.A. § 45-2-1702(a), with jurisdiction over such issues as breach of fiduciary obligations vested in the chancery courts. Waller-Lansden could not render an opinion on the legality of the practice, but found that the principal relevant statute had never been judicially construed. *(supra,* p. 21). Nor could any prudent law firm render such an opinion, both because of lack of relevant judicial authority and the fact that rendering a legal opinion for future reliance implicates possible professional liability. This subject is nevertheless a part of this case, and needs to be bourne in mind in considering Sentinel's *bona fieds.*

The Commissioner has promulgated no regulations on this subject, nor, indeed, any

regulations pertinent to this case. But, as shown on trial, most trust companies are owned by banks or bank holding companies, and under the Act, banks can themselves engage in the trust-company business if granted fiduciary powers, and it is otherwise illegal for a bank to serve as trustee. T.C.A. §§45-2-1702(a).

With all banks of any size being federally-insured and thereby subjected to extensive federal legal requirements, the Federal Government is the situs from which regulations on this subject issue, and it is understood that such are, in fact, the guidelines used as well by state banking authorities in overseeing banks and trust companies. The Tennessee Department of Financial Institutions has not promulgated any such rules or guidelines.

However, Federal regulatory rules provide nation-wide guidance and a national standard, and with reference to an institution's assurance of its own financial integrity, 12 C.F.R. § 363, App. A states, in part, "In considering what information is needed on safeguarding of assets and standards for internal controls, management may review guidelines provided by its primary federal regulator; the FDIC's Division of Supervision Manual of Examination Policies; the Federal Reserve Board's Commercial Bank Examination Manual and other relevant regulations . . ."

Such manuals show what is commonly accepted as proper throughout the country, and the F.D.I.C. has promulgated them at least for both the bank and trust businesses.. The following includes quotations from the F.D.I.C.'s *Trust Manual* and *Manual of Examination Policies*.

The FDIC Trust Manual gives introductory general instructions for interpreting the specific terms thereof, including the following:

> "As a fiduciary, the bank's primary duty is the management and care of property for others. This responsibility requires the duty of loyalty, the duty to keep clear and accurate accounts, the duty to preserve and make productive trust property, as well as a myriad of other responsibilities. Refer to Section 4, Common Law duties.
>
> * * * *
>
> "The body of common law is much more voluminous and detailed than civil law. Therefore,

management should have at least a general familiarity with some of the more widely known common law authorities such as Scott, Bogert, and the *Restatement of the Law of Trusts."* *(FDIC Trust Manual* §§ 1.A., 4A.3.a.; emphasis added)

The primary conveniently-accessable referenced authority to the most uniform determination of trust law is the *Restatement of Trusts.* Concerning the handling of trust funds by corporate fiduciaries which may administer hundreds or thousands of trusts, the Restatement says in part:

> *"Where the trustee holds the funds of numerous beneficiaries,* and it would be unreasonable and not subserve any purpose in protecting the interests of the beneficiaries of the several trusts to require him to keep separate the funds of the different trusts, *it may be proper for the trustee to mingle funds of the different trusts by deposit thereof in a common bank account. Thus, ordinarily a trust company can properly deposit in a single trust account in another bank the funds of several trusts, provided that it keeps an accurate record of the contributions of the separate trusts."*
> *(Restatement of Trusts,* §179, Illustration 1; emphases added)

All the Restatements have been recognized as authoritative by Tennessee's appellate courts, and the *Restatement of Trusts* recognizes that it is permissible and proper for a trust institution to pool trust funds in a single bank account, with ownership of the different funds within the pooled account being recognized on the books of the trust institution—not the depository bank's books—as the appropriate way to manage many accounts without losing identity of ownership, which is precisely Mr. Bates' understanding of the manner of avoiding mingling of funds in trust company operations and the manner in which Sentinel handled its funds. *(Supra,* p. 25-27, 29)

In recognition of the methodology approved by the *Restatement of Trusts,* the F.D.I.C. *Trust Manual* provides in part:

> *"A master deposit account is a single interest-bearing deposit account in which the temporary funds of individual trust accounts are commingled. The master deposit account is*

often a money market deposit account of the fiduciary institution. Only deposits are involved,[43] no other types of assets are held in the master deposit account. *The number of trust accounts invested in and the balance of the master deposit account may vary from day to day.* ***This is not a common or collective investment fund.*** *The concerns with a master deposit account include, management's ability to: identify the amount of funds attributable to each trust account invested in the master deposit account, ensure that the funds of each trust account is not left in the master deposit account as a long term investment,* determine how FDIC insurance applies to the trust account invested in the master deposit account, and identify conflicts of interest."

(F.D.I.C *Trust Manual,* § 7, ¶ N.1.; Emphases added).

This is precisely the method followed at all times by Sentinel, whose records always showed the ownership of each trust account, and the moneys were held temporarily in the pooled account, regardless of whether the Commissioner and his agents have the computer program expertise and have taken the time to call up and study these records.

The F.D.I.C. *Trust Manual* further provides in part:

"Management must establish a formal system of monitoring uninvested funds. *The combined income and principal cash of all the department's accounts are generally deposited into one account.* The key consideration is not the aggregate amount on deposit, but rather, the reasonableness of the uninvested balances of the individual accounts, considering both the individual account's liquidity requirements and the fiduciary's duty to make trust property productive." (F.D.I.C. *Trust Manual,* § 8, ¶ 2.. ; Emphasis added)

Sentinel's method of handling the pooled trust funds fully complied with these requirements, compliance with the investment requirement provisions having at all times been secured by Sentinel's agreement with its correspondent bank, requiring daily "sweeps" of all but the minimum amount into an overnight investment account earning market interest rates, which Sentinel averaged and used each bank-statement period to compute average daily interest rates and credit them to each trust fund having a positive balance *(supra,* p. 26)

---

[43]Parenthetically, all the funds in Sentinel's pooled account constituted a deposit held among the credits that SunTrust Bank treated as cash.

The F.D.I.C. *Trust Manual* further provides in part:

> "When data processing systems are in use, it is common practice to post all properly encoded items, *regardless of whether an overdraft is created.* . . . The total of the resulting practice is to post all properly encoded debit items, regardless of whether an overdraft is created. . . . *Cash items and related records usually are in the custody of one employee* [of the trust company] . . ."
>
> (F.D.I.C. *Trust Manual,* § 3.4; emphasis added).

Sentinel's mode of handling trust funds, and permitting overdrafts for bond issues adequately secured by collateral was the mode recognized as proper by the quoted authorities and followed by trust departments of banks having fiduciary powers, which Sentinel had followed for many years with the full knowledge of the Department and without any objections expressed by it before it commenced its attack against Sentinel.

A question lurking throughout all departmental and judicial proceedings must be whether Sentinel's practice was at least a normal, competent, and honest system, regardless of whether the Department had sufficient experience with stand-alone trust companies, as distinguished from banks, to appreciate it. As shown by testimony of an accountant with highly-recognized expertise, the flow of money was adequate for the overdrafts to be harmless *(supra,* p. 23), this was proven right by Sentinel's experience in overcoming 50 defaults, some with overdrafts of over $1 million over a period of about 5-6 years, with each of these "accounts receivable" having been collected in full by Sentinel, including the substantial compound interest component (profit pro-ratable among all bond issuers to the extent that, at the end of collections, it might exceed the total of all positive balances in those account), with many millions of dollars left (after paying the negative balances) and distributed to bondholders *(supra,* p. 37).

Positions taken by litigants in litigation are binding on appeal, and the Attorney-General conceded to the Chancery Court that there had been successful liquidation on the 50 bond issues, without loss to the pooled trust funds, that Sentinel could have continued successfully liquidating

collateral without time limitation as long as the money kept coming in,[44] *(supra,* p. 19), that nine of these had been liquidated since trust company-seizure by the Receiver, which should pretty well solve any problem *if the receiver continued accruing the 1½% monthly charges against each account* and then properly applied its multi-million dollars receipts on these liquidations to first "zero out" the negatives.

Hence, no court should simply trustingly accept the Commissioner's assumptions that using a pooled trust fund and utilizing overdrafts to temporarily fund liquidation litigation constituted justification for his seizing a corporation and all its assets, in which he owned no property interest. In colloquy, the trial court clearly stated this principal that the mode of operation **does not justify seizure** under the statutory provisions. *(Supra,* p. 30, Item *(i)).*

STATUTORY CONSTRUCTION

At this time, can there be any possible doubt but that if there is uncertainty about the meaning of any statute, the only body of law designated to resolve that uncertainty is the law of statutory construction? After all, it is only another version, recognizing the unique nature of statutes, of the centuries-long law on construction of all instruments—wills, contracts, and legal instruments of every sort: Each word is given its accurate meaning in context, the writing in its entirety must be construed as a whole instead of by concentration on a single provision, a word should be given the same meaning wherever used throughout the instrument, construction should be uniform regarding all parts, if there is a clear, patent ambiguity, it should be resolved by examining only the internal provisions of the document, but if there is a latent ambiguity, that ambiguity is both exposed and resolved by the use of extraneous evidence. In accord: ". . .we do not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U. S. 135, 147, 126 L.Ed.2d 615,

---

[44]And it was coming in to be held and distributed at the rate of $100,000,000 a year, with Sentinel's annual income from fees giving added security to the bond fund that Sentinel would be financially capable of making up any negative for which it would be liable at the conclusion of all enforcement actions.

626, 114 S.Ct. 655, 663 (1994).

At this appellate level, and to this point, neither the Department, the Attorney-General, nor any court has visibly applied the full scope of Tennessee's law of statutory construction to the Tennessee Banking Act and its 1999 amendment. These rules are many, and like Bible texts, can be selected to prove anything if a predetermined result is desired, but when these rules govern, *all of them* relevant to the problem are to be considered, *May v. Anderson,* 156 Tenn. 216, 219-220; 300 S.W.. 12, 14 (1927).

Some of the main rules of statutory construction were recently re-stated by the Supreme Court in *Wilkins v. The Kellogg Company,* 48 S.W.3d 148 (Tenn., 2001), which included the following comments, with interspersion of this writer's comments:

"[The] premise [that a statute be construed favorably to employees doesn't warrant a court's 'amendment, alteration or extension of its provisions beyond its obvious meaning'] is simply a specific application of the most basic rule of statutory construction: **courts must attempt to give effect to the legislative purpose and intent of a statute, as determined by the ordinary meaning of its text, rather than seek to alter or amend it."** (48 S.W.3d at 152; emphasis added).— This prohibits judicial amendment of a statute by changing "bank" to mean "bank or trust company," and equally prohibits drawing legislative intent from other than the body of the statute, absent clear ambiguity. Repeated statements that the Commissioner is empowered to do destructive acts to **state banks** furnish no basis for *de facto* judicial amendment adding trust companies to that term, especially when the statute elsewhere defines the word "bank" as including "trust company" for some sections but for none other.

"In attempting to accomplish this goal [of statutory construction], courts must keep in mind that the 'legislature is presumed to use each word in a statute deliberately, and that the use of each word conveys some intent and has a specific meaning and purpose.' *Bryant v. Genco Stamping & Mfg. Co., 33 S.W.3d 761, 765 (Tenn. 2000).* 'Consequently, where the legislature includes particular language in one section of the statute but omits it in another section of the same act, it is presumed that the legislature acted purposefully in including or excluding that particular

subject.' Id." *(Ibid,;* emphasis added). — So when the Legislature says the Commissioner's powers over **trust companies** should include the one specified power of examination **for a limited period** from July 1, 1999 to June 30, 2002, it should be rationally impermissible to conclude that this expresses a grant not only of the examining power, but of **all other** banking-related powers to be freely exercised over trust companies.

In addition to these rules of construction summarized there by the Supreme Court, when there is an amendatory statute, as here, the "mischief rule" applies, authorizing construction, where needed, to suppress the mischief and give effect to the remedy the legislation sought to make available. With the rule that all words must be given their normal meaning, the Legislature is given notice that if it wants to enact something, it should choose the appropriate words with plain meanings, and not leave the meaning of the enactment to the power-enlarging imagination of some executive. The well-known canons of construction require that the reader be literate and that the reader must allow and compel the words enacted to actually enter his thinking process and use common sense, respecting the fact that words in a single instrument should be given uniform meaning.

The long and short of it is that if the Legislature wanted to create new powers over trust companies, the clearest way for it to do it is to use the words "trust company" in relation to any particular grant of power. The *stare decisis* determination of this point was made by *Madison Loan & Thrift Co. v. Neff,* 648 S.W.2d 655 (Tenn.App., M.S., 1982). Defendant Commissioner's self-serving assumption that emergency bank liquidation powers must be given to him to exercise over trust companies as well is belied by the words of the legislation: If this had **any** rational basis, the Legislature would not have enacted that Defendant Commissioner is empowered to exercise his **bank-examining** powers over every new trust company newly coming under his authority for a limited period of only three years, from July 1, 1999 through June 30, 2002. This would be absurd if the Commissioner were empowered to perpetually exercise over every trust company each power he is empowered to exercise over every state bank.

Previously, when the Legislature wanted to empower the Commissioner to exercise bank-seizure powers over other types of entities, it amended T.C.A. § 45-1-103(3) to enlarge the definition of a

bank ("any person . . . doing a banking business'[45]) by adding that for the purposes of "supervision, examination, and liquidation" the word "bank" also includes "industrial investment companies and industrial banks . . ." The Legislature surely knew it could insert at that point the words "trust companies" as included in the word "bank" but the Legislature did not do so. It surely knew it could provide express language defining "bank" as including "trust company" as it has done in T.C.A. § 45-2-1001(c)(1) "for the purposes of this section and T.C.A.§§ 45-2-1002–45-2-1006". It missed two perfect opportunities to make an enactment unquestionably applicable to trust companies if such were its intent.

The Legislature elected not to insert such phraseology to *drastically change and enlarge* the powers of the Commissioner over *every trust company,* both those under his authority since 1980 and those newly subjected to his authority by the 1999 Act. Courts are not empowered to amend this legislation by inserting words that would make it mean what the Commissioner wishes it meant. But the Legislature addressed one of those listed powers, that of "examination" and deliberately enacted that the Commissioner can exercise that power over trust companies for only a limited 3-year period. **This grant of power had expired** before this Commissioner did his final "examination."

But the Legislature **did** consider and enact a special provision relating alone to trust companies, not banks, whether those trust companies newly came under his general policing authority in 1999 or had already been subject to his charter-approval and regulatory authority since 1980.

This is in regard to ending corporate existence or selling all corporate assets *of trust companies.* The Tennessee Banking Act has long empowered the Commissioner to seize an insolvent bank, and has prescribed with great particularity how he shall do it and the scope of his powers, T.C.A. § 45-1-107, T.C.A. § 45-2-1502, and T.C.A. § 45-2-1504, with the terminal provision that when all the liquidating and accounting have been achieved, the bank's "charter shall be cancelled." T.C.A. § 45-2-1504(k).

But to back up, aside from *quo warranto* and administrative forfeiture of a corporate charter for

---

[45]This doesn't include trust company, which does not and can not accept deposits, and no checks can be drawn against the moneys it holds in trust.

failure to file required reports, the general corporate laws provide for surrender of a corporate charter and the corporation's dissolution upon a filing approved by a majority of the corporation's *stockholders.* The 1999 Amendment provides that it amends these two chapters of T.C.A—as distinguished from an amendment to a single previous Act, thereby subjecting it to the entire Code's basic rule for construction, which says: "If provisions of different titles or chapters of the code appear to contravene each other, *the provisions of each title or chapter shall prevail as to all matters and questions growing out of the subject matter of that title or chapter."* T.C.A. § 1-3-103 (emphasis added).

This says in the plainest possible language that the general statute on corporations governs the termination of corporate existence and the sale of all the corporation's assets, except where other provisions specifically provide different methods in special cases, *e.g.,* administrative charter forfeiture, *quo warranto,* and the termination of a banking corporation's existence by operation of law under T.C.A. § 45-2-1504(k). The searcher is led to these different parts of the code, but they say nothing different about involuntarily ending a trust company's existence or divesting it of its assets by seizure.

But an enactment *was* made **by the 1999 Act** on this subject: How to divest an insolvent trust company of its properties and business *under the Commissioner's official oversight* and without its stockholders' consent. That provision is codified as T.C.A. § 45-2-1021.

This codification incorporates part of Chapter 112, § 10, Public Acts of 1999. It empowers a trust company's board of directors to vote to sell all of the corporation's assets "without shareholder approval . . .", T.C.A. § 45-2-1021(a), but permits this result **only** with the Commissioner's approval, and it requires the Commissioner make specific findings to authorize such liquidation.[46]

---

[46]The required findings by the Commissioner for dissolution by the Board without stockholder approval are:
"(1) Interests of the state trust company's clients and creditors are jeopardized because of insolvency or imminent insolvency of the state trust company; and

"(2) Sale is in the best interest of the state trust company's clients and creditors."
T.C.A. § 45-2-1021(a)(1) and (2)

This is followed by provisions of T.C.A. 45-2-1021(b) of precise requirements of such final asset sale.[47] The required findings do not speak of protecting the interest of *depositors*, and it dictates that the method of remedying the problem is to sell all the trust company's assets to a buyer which **must assume all of that company's liabilities.** This was the Legislature's enactment, and its *only* enactment dealing with the problem of possible trust company insolvency, and it is far different from what the Commissioner has achieved here through the weight and influence of his office.

If the legislature wanted to grant to the commissioner the power to exercise these sweeping and destructive bank-liquidation powers over a trust company, which holds no deposits as its own property, but only funds in trust for others, the Legislature could have so enacted. Absent the enactment, the Commissioner has no power to insert additional words into the enactment, nor does any Court.

This destructive power, whose creation **in some form** is essential for control of the banking business, because the business is essentially one of a private company creating an equivalent to currency from money that does not exist, and when credit becomes tight and many of a bank's creditors cannot pay their notes or instalment payments, this has repeatedly led to a lack of public confidence, causing a "run" on banks and loss of depositors' money. It is noteworthy that the Attorney-General *admitted* that such seizure causes problems because of the sensitive nature of a financial institution's seizure (R. XIV:526).

But to apply these bank-seizure powers in such a precipitous and dictatorial manner to a trust

---

[47]"(b) A sale under this section must include an assumption and promise by the buyer to pay or otherwise discharge:

"(1) All of the state trust company's liabilities to clients;

"(2) All of the state trust company's liabilities for salaries of the state trust company's employees incurred before the date of the sale;

"(3) Obligations incurred by the commissioner arising out of the supervision or sale of the state trust company; and

"(4) Fees and assessments due the department."

company which had already successfully managed the recovery from insolvency of 50 bond issuers whose bonds went into default, is not defensible. The law does not authorize it by clear language and no court should judicially legislate to support the Commissioner's exercise of powers never granted to him.

Finally, the rule of *expressio unius* plainly applies. For the enforcement of all the banking laws against banks and trust companies as well, the statute points the Commissioner to the Davidson County Chancery Court's remedial powers, in whatever part of the state the bank, trust company, or other financial institution may be situated, T.C.A. § 45-2-107(a)(6), and provides one exception of direct, sudden, and forcible action against banks approaching failure, pointing to the lack of any other exceptions. It conditions this exceptional power on threatened harm to **depositors,** but in the alternative mode of terminating a trust company's accounts without consent of their stockholders, it points only to the interests of the trust company's *clients and creditors* being jeopardized, T.C.A. § 45-2-1021(a). Not even that "emergency" threat was presented here. *Cf.,* the trial court's comments, *supra,* p. 30, Item *(iv).*

It would be senseless to grant such sweeping business-seizure powers to be used against trust companies when they **must** be granted over banks, because banks keep so little cash in relation to their deposits. This is controlled by federal law, pointed out *supra,* p. 12, which requires a minimum percentage of cash "reserves," partly in "vault cash" but mostly deposited in a Federal Reserve Bank, as a credit that can immediately be converted into cash to meet every demand that can be reasonably foreseen.

But there is *no statutory requirement,* either federal or state, that a trust company have *any* such reserve, and there is no need for such a requirement. The reason there is no legal requirement for a cash reserve imposed upon trust companies, as distinguished from banks, is that the huge sums of money are held in trust, are not money of the corporate trustee, and form no part of the equation for determining if insolvency (the inability to pay debts as they accrue in the normal course of business) has occurred. So long as a bond-indenture trust company can borrow (by bank loans) enough money occasionally to meet its operating expenses (payroll, supplies, utilities) if need be, it will never have to pay out trust money except to its beneficiaries from money monthly or semi-annually remitted

from bond-issuers. Here, the trial court acknowledged the differing nature of the "bank run" threat and the Attorney-General conceded the ability of a trust company to continue indefinitely, absent seizure *(supra,* pp. 30, sub-paragraph *(vi)* and 19, first bulleted paragraph).

With Sentinel paying out over $100 million a year to bondholders, this does not represent any obligation upon Sentinel to pay out even as much as 1¢ of its own money. If a bond issuer on any issue should withhold paying the required monthly or semi-annual amounts into trust, Sentinel could properly withhold paying the semi-annual interest instalments to bondholders, declare the issue in default, and commence liquidation proceedings against the collateral. When the negative balances of trust fund overdrafts in Sentinel's bond-issuer accounts were at its highest level, at any point when its own earned moneys were in a high cash amount, its directors could have declared a dividend for the rest of Sentinel's non-committed money, and could have sold its trust business, with or without Sentinel's corporate properties.[48] Each month fees from its bond issues produced income for monthly operations and required little or no liquid capital. After all, millions of dollars were received and disbursed each month, averaging about $8⅓ million dollars a month, so there was a lot of cash to assure liquidity to fulfill current trust obligations. These were funded by the obligations of the bond-issuers to transmit to Sentinel the monthly or semi-annual payments required by their bond indentures.

If the reserve requirements that are essential for every bank were imposed upon Sentinel, with its $100 million or more in transactions every year, it would have had to keep a cash reserve of $9,750,000 (see **Ex. 1,** ¶ 3, p. 3, and federal statutory citations therein). This would be absurd and arbitrary. This would mean that Sentinel would have to deposit it in a bank or banks so the banks could enrich themselves by earning high interest rates while paying its depositor the customary low interest rate of around 1%± per annum.. It is an accepted principle of statutory construction in Tennessee law: "It is presumed that the Legislature in enacting [any] statute did not intend an absurdity, and such a result will be avoided if the terms of the statute admit of it by *a reasonable construction.*" *Epstein v. State,* 211 Tenn. 633, 641, 366 S.W.2d 914, 918 (1963).

---

[48]This, of course, would have to be with the Commissioner's approval, and he is empowered to approve such a transfer only when made.

SUPPLEMENTAL ARGUMENT ON SPECIFIC ISSUES

First Issue: **The Commissioner acted beyond his legal authority within the factual background of Appellant Sentinel Trust Company acting as indenture trustee under hundreds of bond indentures, and required to liquidate the assets of over 60 suddenly-defaulted (1998-1999) bond issues, of which Sentinel had closed out all but 13 when the Commissioner of Financial Institutions claimed and exercised the authority to seize said company in 2004 upon his theory that statutory empowerment by the Tennessee Banking Act, T.C.A. Title 45, Chapters 1 and 2 (herein, the Act), to seize an insolvent *bank* empowered him likewise to seize a *trust company* without prior hearing, as to which the Act provided a procedure different from seizure (and inapplicable to banks) for cases of trust-company insolvencies, when construed in compliance with the applicable law, being Tennessee's law of statutory construction, inasmuch as the said Act, as amended by Ch. 620, Public Acts of 1980 (empowering the said Commissioner of Financial Institutions to thereafter charter trust companies, but excluding from his regulatory authority trust companies previously authorized to act as such by Tennessee corporate charters, and its later modification by Ch. 112, Public Acts of 1999, to bring the previously-exempt or "grandfathered" chartered trust companies (including Appellant) under the Commissioner's powers for the first time, did not by such amendment *ipso facto* change the word "bank" to include "trust company" wherever it appears in the Tennessee Banking Act, and particularly in regard to bank seizure powers, as desired by the Commissioner, by language merely subjecting the newly-affected old chartered trust companies to the provisions of the Tennessee Banking Act, *(i)* which legislation failed to explicitly expand the defined scope of the Commissioner's seizure powers to cover trust companies as it had done in the past as to some other types of non-banking institutions, and *(ii)* when such legislation *did* explicitly make some of the Commissioner's bank-regulatory powers (but not the seizure powers) *temporarily* exercisable over trust companies for only a 3-year period, which expired June 30, 2002.**

The above argument on statutory construction *(supra,* pp. 38-45) should adequately answer this issue favorably to Sentinel but for one additional point that need be mentioned only briefly: The fact is that even for state bank seizure, the law does not give the Commissioner the power to seize without a prior administrative hearing, and this deficiency was noted by the Court below, but without any satisfactory answer provided either by the Attorney-General or the Court, the Court saying that the "commissioner may take possession of the state bank *without prior hearing* . . ." upon the existence of an emergency "which will result in serious losses to the depositor." (R. XIV:512) This

was later expanded with the accurate observation that the Commissioner couldn't seize a bank merely "to stop an illegal practice." (R. XIV:525). This recognized that the only basis for seizing without a prior hearing was that explicitly provided by statute: that which "will result in serious losses to depositors, . . ." T.C.A. § 45-2-1502(c)(1).

Further, with the Court having recognized that this seizure *without prior hearing* was outside the precise scope of the legislative grant of power to seize without prior administrative hearing validating the planned seizure is contrary to the requirements of the Due Process Clause of the Fourteenth Amendment, which the Court assumed was permissible because of the availability of rapid *certiorari* hearing, as shown to be accurate in the two following paragraphs.

United States Supreme Court decisions have differentiated between the virtually "accidental" property takings by state employees, almost always without the state's foreknowledge, where it is often impossible and always impractical for a state to provide a prior hearing, and the deliberate seizure without utilizing a hearing procedure made specifically available by state law, as here. That Court spoke of "cases [which] recognize that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." in *Parratt v. Taylor*, 451 U.S. 527, 539; 101 S. Ct. 1908, 1915; 68 L. Ed. 2d 420, 431 (1981).

Later, in *Hudson v. Palmer,* 468 U.S. 517, 532, 104 S.Ct. 3194, 3203, 82 L.Ed. 2d 393, 407 (1984), the Court differentiated between the "accidental" and the deliberate: "Two Terms ago, we reaffirmed our holding in *Parratt* in *Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982),* in the course of holding that postdeprivation remedies do not satisfy due process where a deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action."

Here, the established state procedure did not authorize seizure of a "state Bank" without prior

hearing unless the emergency "will result in serious losses to depositors, . . ." *(supra,* fourth paragraph above, p.47)

The clear and obvious statutory requirement for administrative prehearing before seizing a non-depository trust company, expressed by the trial court itself *(supra,* first paragraph of this issue's argument, p. 46), describes the situation that exists when a public official or agency exercises a power not granted. "Administrative agencies have only such power as is granted them by statute, and any action which is not authorized by the statutes is a nullity." *General Portland, Inc. v. Chattanooga-Hamilton County Air Pollution Control Board, 560 S.W.2d 910, 913 (Tenn. App. 1976),* as quoted by this Court in *Madison Loan & Thrift Co. v. Neff,* 648 S.W.2d 655 (Tenn.App., M.S., 1982). The forgoing appear to answer any tendered argument seeking to show that the Commissioner had *any lawful power* to commit his acts of seizure. Does this not render legally invalid his entire series of subsequent acts flowing from the seizure, as in the consequences of a forbidden search and seizure without justification?

Second Issue: The Court erred—

(a) in rendering its initial decision declining to issue the writ of *supersedeas* to prevent the Commissioner from transferring Sentinel's valuable trust accounts and subsequently refusing to reverse the Commissioner's seizure and liquidation decisions based upon the Court's acceptance of the Commissioner's contention that he was justified in such seizure actions despite the trust company's showings and insistence that: *(i)* a bank has always been different from a trust company, because the identifying quality of every bank is that it is authorized to accept deposits (all deposited money thereby becoming unencumbered property of the bank) which create the debtor-creditor relation, with each creditor-depositor absolutely entitled to withdraw its entire deposit any day, while a trust company holds other persons' moneys in trust, with no rights to disbursement except as provided by the trust instrument; *(ii)* the text of the statute does not by its terms authorize the Commissioner to seize trust companies as distinguished from banks, so that the only possible way the text can be modified to make the word "bank" include "trust company" is through application of the law of statutory construction, which the Court arguably refused to enunciate or apply; *(iii)* statutory law expressly withholds authorizing the Commissioner to seize even a "state bank" without a prior due-process hearing except where necessary *to protect depositors' interests* from imminent loss, which power to seize plainly is not be vested as to any company which *has no depositors and never had depositors* (including Sentinel), but which only holds large amounts of other entities'

moneys in trust for trust settlors and beneficiaries.

(b) in refusing to grant petitioner Sentinel Trust Company the relief it sought by its sworn petition for *Certiorari* and *Supersedeas* and by its actions in: *(i)* denying, by interlocutory order, the writ of *Supersedeas* to prevent threatened transfer of Sentinel's valuable fiduciary accounts upon a clear showing that the Tennessee Banking Act's language only authorized seizure of "state banks", without either adhering to the law of statutory construction, enunciating any statutory construction theory as arguably expanding the meaning of the word "bank" to include "trust company" despite language incompatibilities, or attempting to demonstrate that the law of statutory construction is irrelevant to the task of construing the statute any way a Tennessee executive department wishes it construed; *(ii)* Looking back to the Court's own denial of *Supersedeas* to attempt to justify denial of *Certiorari* relief as prayed (A) in apparent disregard of the U. S. Supreme Court's due process jurisprudence as to the objective minimum required standard of impartiality and (B) upon speculation that its grant might be ineffective as in a past reported decision, despite the fact that there was no evidence before the Court in the *certiorari* trial that Sentinel's accounts actually had been transferred, and despite the fact that Sentinel still owned its real properties that the Commissioner was trying to sell; *(iii)* in light of the fact that the Commissioner elected to file an answer as permitted but not required by statute, in which the Commissioner did not deny the well-pleaded allegations of Sentinel's sworn Petition for *Certiorari*, including attached authenticated documentation, the Court failed to explicitly hold and give effect to all well-pleaded allegations of the petition as being established by non-denial; *(iv)* in giving no effect to affirmative proof that the Commissioner erred in assuming, without basis in reason or fact, that Sentinel's *fiduciary assets* constituted *corporate liabilities,* and disregarding the unquestionable fact that the large "accounts receivable" did not represent diversions of funds, but represented a combination of overdrafts and 1½% interest per month, compounded monthly, with such accounts receivable being the property of the pooled trust funds rather than Sentinel, and being more than double the amount of moneys temporarily borrowed, which temporary shortage should be fully recoverable from the assets of defaulted bond issuers over time, as such shortages had been overcome by Sentinel in the past upon liquidation of collateral on the 50 closed-out defaulted issues; *(v)* disregarding proof of unquestionable accuracy that Sentinel was not insolvent when it was seized, and that it would be impossible to determine whether it would be even indebted to the trust funds until after completion of liquidations on defaulted issues; *(vi)* that the Commissioner was given no statutory authority to enforce fiduciary obligations (the arguable breach of which was the only basis for concern) as to which the judicial remedy is given to trust beneficiaries by T.C. A., Title 35, which the Banking Act gave the Commissioner no authority either to construe or to enforce; and *(vii)* in failing to give effect to the fact that the Commissioner was proven to have exclusive custody of all of Sentinel's paper and computerized records, and proof that the Commissioner could easily rapidly check and confirm the truth Sentinel's testimony as to its mode of crediting and debiting accounts,

which would have refuted Sentinel's proof had the same been untrue, and the Commissioner failed to offer evidence to show by Sentinel records that its proof was untrue, so that the Commissioner should be held strictly liable for his suppression of such evidence by presuming the same to be contrary to his contentions.

Appellant deems the argument preliminarily presented is adequate as to most of the substantive law embedded in this issue, but the following is needed, partly for constitutional reasons, to demonstrate that the issue properly goes beyond that preliminary argument:

1. In presenting positions on the *supersedeas* issues, the Attorney-General acknowledged a prime construction rule that words should be given their ordinary meaning (actually supporting the basic part of Sentinel's position that "bank" means "bank" in the grant of powers over state banks), but followed this by branding as **novel** Sentinel's position that the grant of powers over banks does not grant powers over trust companies. This mis-characterization of the ancient and accepted as new and extraordinary was accepted by the Court in its opinion likewise referring to Sentinel's position as **novel** (R., VI:682). (1-103(27), 124, etc.) In the Court's *supersedeas* memorandum, these were essentially multiple uses of the same isolated description verbiage ("as determined by the Commissioner") of the Tennessee Banking Act 1999 amendment. Within statutory construction theory, such such should be viewed as equivalent to relying upon a single isolated provision. Sentinel insists this constitutes a refusal to apply the law of statutory construction, or at least a refusal to enunciate any recognizable statutory construction rationale while giving lip service to that controlling body of law.

2. The Court's failure to heed the controlling law in the *supersedeas* decision was, as shown below, a refusal to follow the law of the land, which obligated the Court to revisit the issue anew and give it serious and impartial consideration in the *certiorari* hearing and decision, but the Court appeared to disregard its duty imposed constitutionally by the Fourteenth Amendment's Due Process Clause, as pointed out to the Court: *"Armstrong v. Manzo,* 380 U.S. 545, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965) [holds] that where a judge on a rehearing imposed upon a civil defendant the obligation to overcome a prior judge's inappropriate finding of non-support by bearing the burden of proof to

show it was wrong, such predisposition by the judge denied the defendant the impartiality mandated by due process of law." (Trial Brief, 4, R. VII:886). Though Sentinel insisted before trial, in most respectful terms, that *Manzo* means it was obligated to consider anew the statutory construction issue, putting aside its interlocutory failure to follow that law in its *supersedeas* decision, the Court absolutely and explicitly refused to reconsider this issue *(supra,* p.30).

Obviously, all recognize that personal interest or animosity would disqualify any judge, but *Manzo* demands disqualification if the judge has decided to follow some procedural rule about burden of proof or to decline to give the required *bona fide* consideration anew of a hotly-contested issue presented in both an interlocutory motion hearing and the final trial on the merits. But further than this, it is true that: "Before a court whose purpose is to achieve a predetermined, unguided and unrestrained objective, no individual can hope to stand and receive a fair hearing." Drowota, J., concurring in majority opinion (also by Drowota, J.), *Summers v. Thompson,* 764 S.W.2d 182 (Tenn., 1988). Does not Justice Drowota's description of an unconstitutional degree of partiality equally apply when a judge has given passing consideration to a dispositive body of law in an interlocutory decision, and then refuses to reconsider that decision anew, particularly when neither any court nor any party has enunciated any serious refutation of Sentinel's studied argument?

That factor is relevant, because the Court's stated reasoning used reliance on its own past erronious neglect to expound this law to support its supposition that it had now become too late to act, when the lateness was largely the result of the *supersedeas* decision. When the action of a state court wrongly denies due process, this is the action of the State itself, in violation of the Fourteenth Amendment, *Shelley v. Kraemer,* 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836 (1948).

3. The Court gave effect to the Attorney-General's factually unsupported position that Sentinel was essentially destroyed (R., XIV:534-535, VII:866), when there remained trust funds that Sentinel could continue administering,[49] and Sentinel retained ownership of its computers, computer

[49]There is no evidentiary basis to suspect that the bond-issuers would not continue to prefer Sentinel as their trustee, if a valid judgment should undo the probable damage to

records, paper records, and real estate office-site properties in Nashville and in Hohenwald. The indication that a judgment might prove ineffective (R VII:866) was based upon *Boyce v. Williams, Commissioner of Insurance and Banking,* 215 Tenn. 704, 389 S.W.2d 272 (1965), holding illegal the Commissioner's actions in destroying a corporation as without authority, but holding that because the corporation's assets were scattered throughout other states, *certiorari* could not remedy it.

This is a particularly egregious error, because, as shown above, Sentinel had not been destroyed, the *Williams* decision lurked in this record throughout, being one of the main bases for the urgency, *supersedeas* having been sought to prevent what appeared to be the urgency of imminent destruction, with the Commissioner having asked for bids on Sentinel's trust accounts for the purpose of selling them *(supra,* p.52). Hence, unless either the Attorney-General or a court shall demonstrate, by statutory construction rationale, why "bank" doesn't mean "bank" in provisions conditionally[50] empowering the Commissioner to seize and liquidate a "state bank" under the Banking Act, *unless* Sentinel's statutory construction rationale be demonstrated to be incorrect, the only reason that the partial destruction proceeded after August, 2004, is that the Chancery Court did not then grant *supersedeas.* (R VI:682). Under *Shelley v. Kraemer* rationale, Tennessee acted through the Court by its *certiorari* order what it had previously sanctioned by denying *supersedeas,* thereby protecting Tennessee (through its Department of Financial Institutions) from public exposure of the fact that it had exercised power not granted to it by law.

4. There is no question but that Sentinel was not insolvent when seized, the Court having plainly accepted the truth of CPA Whisenant's testimony of non-insolvency, and the Attorney-General having conceded that Sentinel could have successfully continued operating the same way

---

Sentinel's business reputation by his acts of seizure and the many postings on the Department's internet site.

[50]Obviously, the Court was aware, from its own statements, that the condition to empowering the Commissioner to seize without a prior administrative hearing had not been met *(supra,* p.30)

absent seizure, confirming Bates' testimony that it was not in arrears in any of its bills *(supra,* p. 28). Even aside from this, Mr. Whisenant's testimony should not have been needed, because the sworn petition for *Certiorari* established the necessary facts, in no material way rebutted by the Administrative Record, and quite plainly, it should need no expert knowledge to demonstrate to any person that its trust **assets** could not possibly be equated to corporate **liabilities,** the main basis for the Commissioner's seizure decision. Everyone knows the two are opposites.

5. The issue of the Commissioner's failure to produce any proof from Sentinel's records re: Sentinel each month crediting every bond fund positive balance with interest at the average daily rate earned for the number of days in the statement period, and charging each bond fund negative balance with an added 1½% of the shortage should be proof positive that Sentinel's computerized records would have refuted the Commissioner's position. This is most often raised and held by holdings that when a party has a witness with relevant knowledge under his control or influence and fails to use him as a witness, despite his availability, there is a presumption that the friendly witness' testimony would be harmful to that party's case. Here, the suppressed "witness" consists of the records themselves, which must be comprehended by the human intellect to be informative, so the massive bytes of electronic data could not possibly be brought into any court.

The Commissioner's action at least purported to be based upon his perception of the truth as to Sentinel's affairs, and those records, examined by the Commissioner's Receiver's personnel, would either have conclusively corroborated Mr. Bates' testimony on the record-keeping method or would prove that he lied under oath. The only possible way the Commissioner could have arrived at an opinion on the truth of Bates' methodology claims was by having the computer records checked. This could have been done in minutes by anyone knowledgeable about computer software.. Bates' testimony came as no surprise to the Attorney-General, because this methodology was spelled out in detail in the sworn *certiorari* petition, known for over 9 months before the hearing.

The United States Supreme Court has followed this line of analysis by holding that a government investigation of complex matters can never prove misconduct **unless** the government

further investigates to determine the truth or falsity of any "leads," or asserted claims of anti-government evidence. If these are not are fully investigated, this can destroy the sufficiency of a government's evidence as a matter of law (leading to a directed verdict against the government), *Holland v. United States,* 348 U.S. 121; 75 S. Ct. 127; 99 L. Ed. 150 (1954).[51]

Such rule, a virtual corollary of the suppressed witness rule, is a sound rule that should be followed here: There is no way Bates can get to his company's records, sequestered as they are under the Commissioner's control, he doesn't need to check them because he already knows what they show, and if he did check them, the Department would just attack his credibility. Hence, the only way any court can know if the Commissioner's case is fake is for the Commissioner to check those records. The least of his duty as a public official, when the truth of his assumptions is attacked, is to do the simple check to determine if his case is a fraud on the court, or if Witness Bates has committed perjury. The Commissioner's failure to produce responsive evidence, in the face of Appellants' detailed and massive evidence, should require a rejection of his factual pretensions. After all, data entered on a computer remains there on the hard drive, probably backed up on disks, so verification by spot-checking over time is extremely simple, if the verifier has computer literacy.

Third Issue: If appropriate for decision, whether the statute under which the Commissioner claimed to act, the Tennessee Banking Act, apart from the foregoing, is unconstitutional on its face, because it attempts to vest in the Commissioner, a member of the Executive Department of Tennessee's government, certain powers which may be vested only in the judiciary, including the judicial power to impose receiverships and appoint receivers,

---

[51]"When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer -- leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury. 348 U.S. at 136, 99 L. Ed. at 164.

and the judicial power to bring about the dissolution of a corporation for insolvency, as well as the legislative power to make provisions of the Tennessee Banking Act applicable or inapplicable to non-banking corporations, at his pleasure.

The *Certiorari* Petition claimed that the powers displayed by the Commissioner—not vested in him— could not have been legally vested in him. In insolvency matters, from time immemorial, the judiciary has ordered seizure of properties to preserve the *status quo ante* pending litigation of issues, has appointed and oveseen the work of receivers in protecting and even liquidating it, and has caused it to be sold where adjudged required by insolvency, as well as mandatorily enjoining individuals to do enumerated acts. Each of these things has been done herein by the Commissioner: Mandatory injunctive requirements that Sentinel and its directors do specific acts, appointing a receiver, making determination that liquidation was required, each of which has long been an accepted judicial power.

As stated in *Summers v. Thompson,* 764 S.W.2d 182 (Tenn., 1988):

> "The Tennessee Constitution, Article II, § 1, expressly states that "the powers of the government shall be divided into three distinct departments: the Legislative, Executive, and Judicial," and by Article II, § 2, "*no person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."* n1 *Underwood v. State, 529 S.W.2d 45 (Tenn. 1975),* recognized that "the doctrine of separation of the powers, as set out in Article II, § § 1 and 2, of the Constitution of Tennessee, is a fundamental principle of American constitutional government." *Id., at 47.* Moreover, "'it is essential to the maintenance of republican government that the action of the legislative, judicial, and executive departments should be kept separate and distinct. . . .'" *Richardson v. Young, 122 Tenn. 471, 492, 125 S.W. 664, 668 (1909). . . .*"
> (764 S.W.2d, at 188; emphasis added).

What is implied in the U. S. Constitution is an express prohibition in the Constitution of Tennessee , Art I., § 1 and Article II, § 2.. This prohibition, as applicable to this case, is mostly a protection for the exclusivity of *judicial power,* but it should be no less guarded when it protects legislative or executive powers, because each is on an equal footing, though the nature of the powers differs. A profound appreciation for constitutional prohibitions is also requisite in deciding those questions whose decision is required to be by the law of statutory construction, because every statute

is required to be construed in such manner (if rationally possible) as to avoid unconstitutionality.

Obviously, every government executive, like every legislator and every practicing lawyer must, from time to time, make his own determination of the meaning of statutes and whether they fe constitutional, just as each adult must determine whether he is sick enough to call a doctor. But the *authoritative* determination of meanings of constitutional and statutory provisions is uniquely **judicial**, because when the judiciary has finally spoken, there is no other place to turn. It's over.

Yet these statutes give the Commissioner the formal power to adjudge and enforce, and these powers are judicial in nature even if reviewable (just as a chancery court's judgment is judicial, even though it is reviewable). When the Commissioner exercises one of these powers, and even the appointment of a receiver, its self-executed nature imparts to it, as well, the trait of finality to a considerable degree. See, *Boyce v. Williams, Commissioner of Insurance and Banking,* 215 Tenn. 704, 389 S.W.2d 272 (1965), discussed *supra,* p. 52. Hence the Legislature cannot give these powers to an executive officer of the state government, however much the banking industry may enjoy having one of its own so empowered.

But legislative power is equally sacrosanct. The Banking Act, particularly as amended in 1999, repeatedly uses the phrase "as determined by the Commissioner," and an executive obviously can make factual determinations that call for government action according to the dictates of statutes. But if it is sought to be maintained that the Commissioner can authoritatively determine the "meaning" of a statutory phrase, this cannot be carried to the extreme of empowering him to adjudicate, by making his determination *authoritative* as a practical matter, nor to the extreme of empowering him to legislate, by giving to any statute a meaning inconsistent with its actual meaning as determined by statutory construction law.

And obviously, if the law of statutory construction is not *always* the rule of decision in determining the meaning of complex statutory provisions, but is a rule available only to be used by a judge when it suits his philosophy, then ours is not a government of laws, but a government by judicial whim.

This is a very practical consideration, because if this is a fall-back position, hinted by the Commissioner as the basis of his claims of this extraordinary power against an entity immune from such powers, then he is essentially legislating by changing the meaning of the statute. This possible sub-conscious position "reasons" that the Act says the Commissioner may apply the Banking Act to Trust Companies "as determined by the Commissioner," the Commissioner has "determined" that his bank-seizing powers can be exercised over trust companies[52] therefore, if the Commissioner says it's so, it's so. (As the Attorney-General argued to that Court, R. XI:39, 42).

Fourth: In reviewing *de novo* the decisions of the trial court, its decisions should be reversed and the Commissioner's actions adjudged to be illegal and without statutory authorization, and remanded with mandate that the Commissioner be required to do all acts within his powers to undo his seizures in his exercise of such illegally usurped powers and to give an accounting for all moneys converted under his directions.

This question concerns particularly relief, but also indicates the *de novo* nature of the review. Obviously, all pure questions of law are determinable here *de novo,* but with deference to the Chancery Court's credibility judgments. Sentinel sees no indication that the Court made any credibility determinations, except indication of confidence in CPA Whisenant's credibility *(supra,* p. 30), which no one could doubt, due to numerous factors including his experience, his prior appointments by courts, and his presidency of the Tennessee Association of CPAs. Obviously, when there is no showing that the trial court made credibility determinations, this Court is free to do so without deference to the trial court.

The Court's opinion was mostly critical of Sentinel's lack of cooperation with the Commissioner, with its attorney's hopping from one site of possible relief to another,[53] and that

---

[52]Even though the Act explicitly empowers him to exercise these bank-seizure powers over two named types of non-banks, T.C.A. §45-2-1502, but not over trust companies.

[53]As candidly shown above, the Defendant did, indeed, fail to obey the Commissioner's mandatory injunctive orders, it freely described its financing methods that the present commissioner found repugnant. Clearly, its present litigation attorney kept trying over and over to find a court that would actually enunciate rationale centered on the governing law, and

Sentinel's financial picture the Commissioner faced was not lovely (AR. VII:931-952), plainly indicating no factual determination was being made (AR. VII:949, ¶ 4). Apparently, the Court accepted the credibility of all witnesses, because the Court was impressed that they all agreed on what happened, from which the Commissioner drew his own legal conclusions that the Court deemed acceptable.

As to the remedy prayer, the entire purpose of corrective review is to eliminate the results of trial-court error which enabled action contrary to law. Clearly, any party that contracts with an entity whose contracts are required to be subject to court-approval has thereby submitted itself to the Court's authority, and the Court can order undone what it has ordered done, except for the death penalty. As pointed out in argument, when the Commissioner knew that the legality of his actions were being seriously contested, it is not believable that in the final actions, the Commissioner would have been so irresponsible as to permit final implementation of a contract without reserving to himself some power to undo the effects. There is in this record no evidence that any of Sentinel's assets have been conveyed away beyond redemption. Judicial approval of transfers by a receivership's court empowered only to approve or disapprove sales does not necessarily mean that the receiver actually consummated the deal, particularly when the receiver is answerable to a different master, the Commissioner. Even as to real property, if Sentinel owned its Nashville property, the register's office deeds will not show a conveyance by Sentinel through its corporate

---

contrary to the Court's stated conclusion, Attorney Lemke's testimony was *favorable* to Sentinel: He admitted that Waller-Lansden could not opine on the legality of Sentinel's mode of using credits from the pooled funds—thus swearing to the incorrectness of the Department employee's recollections that Waller-Lansden affirmatively said the mode of operation was improper—he admitted that he could find no judicial authority, and he confirmed the factual accuracy of his partner's summary of the meeting with the Commissioner, which proved that if Sentinel had injected $2 million, the Commissioner would be demanding another $5 million or so, and it would all be lost, because he stated his intent to run Sentinel out of business, by mandatorily requiring it to submit a plan for injecting all that money and bringing its existence to an end *(Supra,* p. 21). As pointed out above, there is a heap of difference between any lawyer opining for future reliance and even the same lawyer seeking to find the probable content of relevant law for litigation purposes.

officers, but probably a deed by a stranger to the title, the "receiver" not appointed by the certifiable order of any court of record. If such stranger to the title was not lawfully vested with ownership or authority to convey, there would have been no title transfer. Such issues have been adjudicated many times unfavorably to one who thought he owned the property. *Boyce v. Williams, Commissioner of Insurance and Banking, supra,* p. 52, is an anomaly—it should not be taken as an inspiration to intentionally repeat ancient mistakes.

Fifth: If it should reach that stage, this Court should hold that the Commissioner's actions and the decisions of the Court below were contrary to the explicit constitutional protections secured to Sentinel and its owners as identified and alleged in detail in the petition for *Certiorari* including the State and Federal Constitutional prohibitions against warrantless seizure of property and against the taking of property without just compensation and the destruction of Sentinel's legal rights without due process of law, without just compensation, and contrary to the law of the land.

The concept and *meaning* of due process of law had their origin and meaning at the time of American Independence, hence derived from the common law, in the older phrase prohibiting the taking of one's life, liberty or property but by the law of the land. This older phraseology for due process is written into Tennessee's Constitution (Art. I, § 20 and Article XI, § 16). Its very earliest origin was in the 39th Chapter of *Magna Carta,* which an English king was compelled by force of arms to sign the year 1215:

> "39. No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and *by the law of the land."*
>
> Pound, *The Development of Constitutional Liberty* (Yale Univ. Press, 1957; Emphasis added).

Tennessee adopted the purer and older language rather than the then-modern catch-phrase, but its meaning had remained unchanged since 1215, over a half-century before our Declaration was made to the world.

Its meaning was simply that government—legislative, executive and judicial—is obligated to follow the existing law when it forfeits one's life, liberty, or property: The property of Sentinel and of its stockholders, who indirectly owned everything Sentinel owned.

The most widely-recognized authority on the state of English law was Blackstone's Commentaries published in 1765. He wrote of the *judicial* due process obligation:

> **"The Courts: Due Process of Law.** It were endless to enumerate all the *affirmative* acts of parliament, wherein justice is directed to be done according to the law of the land; and what that law is, every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge; but is permanent, fixed, and unchangeable, unless by the authority of parliament."[54]

I BLACKSTONE, COMMENTARIES, § 197, pp.*141-*142 (Jones ed., 1915).

Upon incorporation of a second due process clause into the Fourteenth Amendment to bind state governments, this had the core meaning that each state must accord *due process of state law* in inflicting such deprivations, *Dent v. West Virginia,* 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889); *In re Kemmler,* 136 U.S. 436, 10 S.Ct. 940, 34 L.Ed. 519 (1890); *Twining v. New Jersey,* 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908). Although the Eleventh Amendment is a formidable barrier to federal judicial enforcement of the Due Process Clause, and although the U. S. Supreme Court has imaginatively expanded the clause's meaning where it appears in both amendments, into highly particularized narrow applications, that Court has never tried to declare its underlying meaning destroyed. Both the Amendment's Due Process Clause and Tennessee's law of the land clause require that government follow the law (perhaps subject to such parts of the common law as the *de minimus* doctrine) in destroying Sentinel's business and property.

This means *all* of Tennessee's relevant law, including its constitutional prohibitions against executives ever exercising judicial power and judges ever legislating by effectively inserting words not enacted or deleting words enacted,[55] because our Law of the Land Clause is a part of the Declaration of Rights, as to which the following effect is given:

> **Sec. 16. Bill of rights to remain inviolate.** — The declaration of rights hereto

---

[54]Such meaning is reflected in holdings of the U. S. Supreme Court, that the words of the Due Process Clauses ". . . come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land.' " *Dent v. West Virginia,* 129 U.S. 114, 123-124, 9 S. Ct. 231, 234, 32 L. Ed. 623, 626 (1889).

[55]Constitution, Art II, §§ 1 and 2.

prefixed is declared to be a part of the Constitution of this State, and shall never be violated on any pretence whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the bill of rights contained, is excepted out of the General powers of government, and shall forever remain inviolate."

As one long-departed member of the Tennessee Supreme Court wrote, where the Constitutions language is plain, it is not required to be interpreted, but to be obeyed. Such accords precisely with Chief Justice Marshall's understanding of the scope of the proper use of judicial power:

> "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, *a discretion to be exercised in discerning the course prescribed by law;* and, when that is discerned, *it is the duty of the Court to follow it.* Judicial power is never exericised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law." *Osborn v. Bank of the United States,* 22 U.S. 738, 866, 6 L. Ed. 204, 234 (1824).

Such long-accepted Constitutional precepts should be loyally followed in this case; the judiciary's failure to follow law in determining important and difficult issues involving governmental destruction of citizens' rights, is, like the slow action of the U. S. Govement's F.E.M.A. after Hurricane Katrina, is simply "not acceptable."

VI

CONCLUSION

The Court should order the appropriate remedy and remand the case to the lower court for enforcement: Reversing the lower court's orders on both the *certiorari* decision and the interlocutory *supersedeas* decision,[56] should vacate all acts and orders of the Commissioner and require him to do

---

[56]Which this Court declined to accept appellate jurisdiction as discretionary interlocutory appeal by its order of September 1, 2004, *Sentinel Trust Company, et al. v. Kevin P. Lavender,*

all acts within his power, whether the source of the power be contractual, by exercise of the probable inherent power to restore the *status quo ante* to remedy his illegal acts, and by the exercise of such influence he may have with Tennessee's banks. Alternatively, if this Court is not empowered to enter such final judgment, that it remand the case to the Chancery Court with instructions that such Court make and enforce the orders prayed, plus all other orders it may properly enter to seek to assure the restoration of the *status quo ante.* It is further submitted that the remedy should include a requirement that the Commissioner post on the Department's internet site this Court's opinion and all orders made by the Chancery Court and by himself to carry out the remedies prayed herein.

Respectfully submitted,

Carrol D. Kilgore (# 2544)
227 Second Avenue, N., Fourth Floor
Nashville, TN 37201-1631
Tel. (615) 254-8801

Certificate of Service

It is hereby certified that a copy of the foregoing brief has been mailed thisSeptember 14, 2005, postage prepaid, to the following:

JANET M. KLEINFELTER, ESQ.
Financial Division
Attorney-General of Tennessee
425 Fifth Avenue, North
Nashville, Tennessee 37243.

Graham Matherne, Esq.
WYATT, TARRANT & COMBS
2525 West End Avenue
Nashville, TN 37203-1423

No. M2004-02068-COA-R10-CV.

Donald Schwendimann, Esq.
306 W. Main Street
P.O. Box 366
Hohenwald, TN 38462

Statutory Addendum

T.C.A. § 1-3-103

1-3-103. Conflicts within code

If provisions of different titles or chapters of the code appear to contravene each other, the provisions of each title or chapter shall prevail as to all matters and questions growing out of the subject matter of that title or chapter.

HISTORY: Code 1932, § 13; modified; T.C.A. (orig. ed.), § 1-303.

T.C.A. § 35-3-107

35-3-117. Investment in securities of management investment company or investment trust by bank or trust company -- Fiduciary liability -- Abuse of fiduciary discretion

(a) [Deleted by 2002 amendment.]

(b) [Deleted by 2002 amendment.]

(c) [Deleted by 2002 amendment.]

(d) [Deleted by 2002 amendment.]

(e) [Deleted by 2002 amendment.]

(f) [Deleted by 2002 amendment.]

(g) [Deleted by 2002 amendment.]

(h) Notwithstanding any other law, a bank or trust company, to the extent it acts at the direction of another person authorized to direct investment of funds held by the bank or trust company, or to the extent that it exercises investment discretion as a fiduciary, custodian, managing agent, or otherwise with respect to the investment and reinvestment of assets that it maintains in its trust department, may invest and reinvest the assets, subject to the standard contained in this section, in the securities of any open-end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940, *15 U.S.C. § § 80a-1* -- 80a-64. The fact that the bank or trust company, or any affiliate of the bank or trust company, is providing services to the investment company or trust as investment advisor, sponsor, distributor, custodian, transfer agent, registrar or otherwise, and receiving reasonable remuneration for the services, does not preclude the bank or trust company from investing in the securities of such investment company or trust.

(i) In the absence of express provisions to the contrary in the governing instrument, a fiduciary will not be liable to the beneficiaries or to the trust with respect to a decision regarding the allocation and nature of investments of trust assets unless the court determines that the decision was an abuse of the fiduciary's discretion. A court shall not determine that a fiduciary abused its discretion merely because the court would not have exercised the discretion in the same manner.

(j) If a court determines that a fiduciary has abused its discretion regarding the allocation and

nature of investments of trust assets, the remedy is to restore the income and remainder beneficiaries to the positions they would have occupied if the fiduciary had not abused its discretion, according to the following rules:

(1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or a distribution that is too small, the court shall require a distribution from the trust to the beneficiary in an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position, taking into account all prior distributions to the beneficiary.

(2) To the extent that the abuse of discretion has resulted in a distribution to a beneficiary that is too large, the court shall restore the beneficiaries, the trust, or both, in whole or in part, to their appropriate positions, taking into account all prior distributions, by requiring the fiduciary to withhold an amount from one (1) or more future distributions to the beneficiary who received the distribution that was too large or requiring that beneficiary to return some or all of the distribution to the trust.

(3) To the extent that the court is unable, after applying subdivisions (j)(1) and (j)(2), to restore the beneficiaries, the trust, or both, to the position they would have occupied if the fiduciary had not abused its discretion, the court may require the fiduciary to pay an appropriate amount from its own funds to one (1) or more of the beneficiaries or the trust or both.

(k) Upon a petition by the fiduciary, the court having jurisdiction over the trust or agency account shall determine whether a proposed plan of investment by the fiduciary will result in an abuse of the fiduciary's discretion. If the position describes the proposed plan of investment and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the fiduciary relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed plan of investment, a beneficiary who challenges the proposed plan of investment has the burden of establishing that it will result in an abuse of discretion.

HISTORY: Acts 1951, ch. 125, § § 1-6 (Williams, § § 9596.12-9596.17); Acts 1968, ch. 518, § 1; 1971, ch. 61, § 1; 1974, ch. 634, § 1; T.C.A. (orig. ed.), § § 35-319 -- 35-324; Acts 1989, ch. 288, § 2; 1991, ch. 386, § 1; 2001, ch. 57, § § 1, 2; 2002, ch. 696, § 15

T.C.A. §45-2-1001

45-2-1001. Company authorized to act as fiduciary

(a) No company shall act as a fiduciary in this state except:

(1) A state trust company;

(2) A state bank authorized to act as a fiduciary;

(3) A savings association or savings bank organized under the laws of this state and authorized to act as a fiduciary;

(4) A national bank having its principal office in this state and authorized by the comptroller of the currency to act as a fiduciary pursuant to *12 U.S.C. § 92a;*

(5) A federally chartered savings association or savings bank having its principal office in this state and authorized by its federal chartering authority to act as a fiduciary;

(6) An out-of-state bank with a branch in this state established or maintained pursuant to this chapter, or a trust office authorized by the commissioner pursuant to this chapter;

(7) An out-of-state trust company with a trust office authorized by the commissioner pursuant to this chapter;

(8) A foreign bank with a trust office authorized by the commissioner pursuant to this chapter; or

(9) A private trust company to the extent authorized by the commissioner pursuant to this chapter.

(b) No company shall engage in an unauthorized trust activity. No company shall be deemed to be subject to the provisions of chapters 1 and 2 of this title, regulating fiduciary activities to the extent that the company's activities are permitted by existing statutory authority or are customarily performed as a traditional incident to the company's regular business activities.

(c) (1) A bank authorized to act as a fiduciary (which term includes a trust company, for the purposes of this section and § § 45-2-1002 -- 45-2-1006) having and maintaining paid-in capital and surplus of five hundred thousand dollars ($ 500,000) may be appointed a fiduciary or cofiduciary by any person or any court having jurisdiction and authority to appoint fiduciaries.

(2) When appointed as a fiduciary for a minor or other incompetent person, a bank shall have only the custody, control, management and administration of the property or estate of such person.

(3) The personal care and custody of any minor or other incompetent person shall be committed and confided to those individuals who would otherwise be entitled by law to the guardianship or care and custody of the person of such minor or incompetent person.

HISTORY: Acts 1969, ch. 36, § 1 (3.230); T.C.A., § 45-422; 1999, ch. 112, § § 7, 9.

T.C.A. § 45-2-1003

45-2-1003. Segregation and registration of fiduciary assets -- Nominee

(1) A bank or trust company holding any asset as a fiduciary, cofiduciary, agent for a fiduciary or custodian shall segregate all such assets from any other assets of the bank except as may be expressly provided otherwise by law or by the instrument creating the fiduciary relationship and any such asset may be kept by such bank or trust company.

(2) Stocks, bonds, and other securities may be held by such bank or trust company in a manner such that all certificates representing the securities from time to time constituting the assets of a particular estate, trust or other fiduciary account

are held separate from those of all other estates, trusts, or fiduciary accounts; or, in a manner such that certificates representing securities of the same class of the same issues from time to time constituting assets of particular estates, trusts, or other fiduciary accounts are held in bulk, without certification as to ownership attached; provided, that a bank or trust company when operating under the aforementioned method of safekeeping securities shall be subject to such rules and regulations now in effect or hereinafter promulgated by the state banking board with regard to state-chartered institutions and the comptroller of the currency in the case of national banking institutions.

(3) A bank or trust company holding any such securities in bulk may also merge certificates of small denominations into one (1) or more certificates of large denominations and all banks or trust companies acting as a fiduciary with regard to such securities shall on demand certify in writing the securities held by it for any estate, trust or fiduciary account.

(1) Any bank, when acting as a fiduciary or a cofiduciary with others, or as an agent for other fiduciaries may, with the consent of its cofiduciary or cofiduciaries, if any (who are hereby authorized to give such consent), or the fiduciaries for whom it is acting, cause any investment held in any such capacity to be registered and held in its own name, or the name of a nominee, or nominees, of such bank.

(2) Such bank shall be liable for the acts of any such nominee with respect to any investment so registered.

(3) The records of such bank shall at all times show the fiduciary relationship under which any such investment is held, and the securities, or a proper receipt therefor, shall be in the possession and control of such bank.

(4) Any such securities shall be kept separate and apart from the assets of such bank.

(c) Any bank may deposit funds of a fiduciary account awaiting investment or distribution in its commercial banking department or in the commercial banking department of any affiliate bank in the same bank holding company as defined in § 45-2-1402 where the funds may be used in the conduct of its business to the extent that such deposits do not exceed the aggregate of:

(1) The insurance on such deposits provided by the federal deposit insurance corporation;

(2) Cash on hand;

(3) The value of obligations of the United States or any state or any subdivision or instrumentality thereof owned by the bank; and

(4) Such other property as may be approved for this purpose for national banks or for member banks of the federal reserve system.

HISTORY: Acts 1969, ch. 36, § 1 (3.232); 1974, ch. 550, § 1; T.C.A., § 45-424; Acts 1988, ch. 926, § 6.

T.C.A. § 35-3-1004

45-2-1004. Investment in undivided interest in property.

(a) A bank may, subject to the limitations of this section, create undivided interests in property of any nature for the purpose of sale from time to time to accounts held by the bank in any fiduciary capacity. The bank may retain a portion of such undivided interests for its own account if the property is one which it would be authorized to acquire pursuant to this chapter wholly for its own account.

(b) The limitations on such undivided interest shall be:

(1) The interest shall be one which:

(A) The bank would be authorized to acquire pursuant to this chapter and chapter 1 of this title wholly for its own account, and, in the absence of broader investment powers under the terms upon which it was designated as fiduciary, would also be authorized to acquire as a legal investment for funds held by fiduciaries; or

(B) The bank would be authorized to acquire as an investment by the terms upon which it was designated as fiduciary of each account which acquires an undivided interest therein.

(2) Interests not retained by the bank may be sold only to a fiduciary account.

(c) The bank shall exercise all rights of ownership in respect of an interest in which undivided interests have been sold pursuant to this section, and in respect of any property acquired by foreclosure or otherwise in connection with such interest, in its own name but for the benefit of itself and all other owners of the undivided interests in such property.

(d) The bank shall at all times maintain records of all undivided interests created pursuant to this section showing the extent of the undivided interest of each owner of such interest.

(e) The bank may issue a certificate evidencing each undivided interest created pursuant to this section, keep records showing the holders of such certificates, provide for transfer of a certificate by the registered holder thereof upon surrender of the certificate and deal with the registered holder of a certificate as the owner of the undivided interest represented by the certificate. Each certificate shall contain a summary of the rights of an owner of the undivided interest represented thereby and expressly disclaim any guarantee by the bank of payment of any amount.

HISTORY: Acts 1969, ch. 36, § 1 (3.233); T.C.A., § 45-425.

T.C.A. § 45-2-1005

45-2-1005. Fiduciary bond or oath excused

No oath or bond shall be required of a bank to qualify upon appointment as a fiduciary, unless the instrument creating a fiduciary position expressly otherwise provides.

HISTORY: Acts 1969, ch. 36, § 1 (3.234); T.C.A., § 45-426.

T.C.A. § 45-2-1006

45-2-1006. Deposit of securities in federal reserve bank when acting as fiduciary authorized

(a) (1) Any bank or trust company, when acting as a fiduciary, or when holding securities as custodian for a fiduciary, is authorized to deposit, or arrange for the deposit of, with the federal reserve bank in its district, any securities, the principal of and interest on which the United States, or any department, agency or instrumentality thereof, has agreed to pay, has guaranteed to pay, or has guaranteed payment in such manner so as to be credited to one (1) or more accounts on the books of the federal reserve bank in the name of such bank or trust company, to be designated fiduciary or safekeeping accounts.

(2) The bank or trust company so depositing securities with such federal reserve bank shall be subject to such rules and regulations with respect to the making and maintenance of such deposits as, in the case of state chartered institutions, the commissioner, and, in the case of national banking associations, the comptroller of the currency, may from time to time issue.

(3) The records of such bank or trust company shall at all times show the ownership of the securities held in such account.

(4) Ownership of, and other interest in, the securities credited to such account may be transferred by entries on the books of the federal reserve bank without physical delivery of any securities.

(5) A bank or trust company acting as a custodian for a fiduciary shall, on demand by the fiduciary, certify in writing to the fiduciary the securities so deposited by such bank or trust company with such federal reserve bank for the account of such fiduciary.

(6) A fiduciary shall, on demand by any party to its accounting or on demand by the attorney for such party, certify in writing to such party the securities deposited by such fiduciary with such federal reserve bank for its account as such fiduciary.

(b) This section shall apply to all fiduciaries and custodians for fiduciaries, acting on May 3, 1973, or who thereafter may act, regardless of the date of the instrument or court order by which they are appointed.

HISTORY: Acts 1973, ch. 294, § 6; 1973, ch. 384, § § 1, 2; T.C.A. § 45-447.

T.C.A. § 45-2-107

45-1-107. Powers and duties of commissioner

(a) In addition to other powers conferred by this title, the commissioner has the power to:

(1) Interpret the provisions of this chapter and chapter 2 of this title, and regulate banking practices thereunder;

(2) Restrict the withdrawal of deposits from all or one (1) or more state banks where the commissioner finds that extraordinary circumstances make such restriction necessary for the proper protection of depositors in the affected institutions;

(3) Authorize a state bank to participate in a public agency hereafter created under the laws of this state or of the United States, the purpose of which is to afford advantages or safeguards to banks or to depositors and to comply with all requirements and conditions imposed upon such participants;

(4) Order any person to cease violating a provision of this title or lawful regulation issued under this title;

(5) Order any person to cease and desist from engaging in any unsafe or unsound banking practice when such practice is likely to cause insolvency or dissipation of assets or earnings of a state bank or is likely to otherwise seriously prejudice the interests of the depositors of a state bank; and

(6) Bring an action in the chancery court of Davidson County to enjoin any act or practice in or from this state which constitutes a violation of any provision of law or any rule or order which the department has the duty to execute pursuant to § 45-1-104. The court may not require the commissioner to post a bond in bringing such an action. Upon a proper showing by the commissioner, the court shall grant a permanent or temporary injunction, restraining order, writ of mandamus, disgorgement, or other proper equitable relief including the recovery by the commissioner of costs and attorney fees. Further, to the extent that this subdivision does not conflict with other provisions of this title, a receiver or conservator may be appointed for the defendant or the defendant's assets.

(b) The commissioner may remove a director, trustee, officer or employee of a state bank who becomes ineligible to hold such position or who, after receipt of an order to cease under subsection (a), violates the provisions of this title or a lawful regulation or order issued thereunder, or who is dishonest. It is a criminal offense against the state for any such persons, after receipt of a removal order, to perform any duty or exercise any power of any state bank for a period of three (3) years. A removal order shall specify the grounds thereof and a copy of the order shall be sent to the bank concerned.

(c) Notice and opportunity for a hearing shall be provided in advance of any of the foregoing actions in this section taken by the commissioner, except the formulation of regulations of general application. In cases involving extraordinary circumstances requiring immediate action, the commissioner may take such action but shall promptly afford a subsequent hearing upon application to rescind the action taken.

(d) The commissioner may, on petition of any interested person and after hearing, issue a

declaratory order with respect to the applicability to any person, property or state of facts under this title or a rule issued by the commissioner. The order shall bind the commissioner and all parties to the proceeding on the state of facts alleged unless it is modified or reversed by a court. A declaratory order may be reviewed and enforced in the same manner as other orders of the commissioner, but the refusal to issue a declaratory order shall not be reviewable.

(e) In addition to other powers conferred by this title, the commissioner has power to require a state bank to:

(1) Maintain its accounts in accordance with such regulations as the commissioner may prescribe having regard to the size of the organization;

(2) Observe methods and standards which the commissioner may prescribe for determining the value of various types of assets;

(3) Charge off the whole or part of an asset which at the time of the commissioner's action could not lawfully be acquired;

(4) Write down an asset to its market value;

(5) Record liens and security in property or at the option of the bank, insure against losses from not recording;

(6) Obtain a financial statement from a prospective borrower to the extent that the bank can do so;

(7) Search, or obtain insurance of, the title to real estate taken as security;

(8) Maintain adequate insurance against such other risks as the commissioner may determine to be necessary and appropriate for the protection of depositors and the public; and

(9) Call a special meeting of the shareholders.

(f) The commissioner has the power to subpoena witnesses, compel their attendance, require the production of evidence, administer an oath and examine any person under oath in connection with any subject relating to duty imposed upon or a power vested in the commissioner. These powers shall be enforced by a court of competent jurisdiction of the county in which the hearing is held.

(g) No person shall be subjected to any civil or criminal liability for any act or omission to act in good faith in reliance upon a subsisting order, regulation or definition of the commissioner, notwithstanding a subsequent decision by a court invalidating the order, regulation or definition.

(h) The commissioner is hereby granted the power to enact reasonable substantive and procedural rules to carry out the purposes of any and all chapters within the commissioner's regulatory authority as conferred by law. This power shall specifically include, but not be limited to, the authority to establish a schedule of fees to be charged by the department relative to notifications or applications to be reviewed by the department. Such promulgation shall be done in conformity with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

HISTORY: Acts 1969, ch. 36, § 1 (2.012); impl. am. Acts 1971, ch. 137, § 2; Acts 1973, ch. 294, § 12; 1975, ch. 59, § 1; 1978, ch. 516, § 1; T.C.A., § 45-108; Acts 1992, ch. 658, § 1; 1993, ch. 130, § 1; 1994, ch. 551, § 1; 1996, ch. 562, § 2; 2001, ch. 54, § § 1, 2